Neutral Citation Number: [2021] EWCA Civ 492

Case No: A2/2020/1835

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BIRMINGHAM
Martin Spencer J
[2020] EWHC 2372 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 April 2021

Before :

LORD JUSTICE NUGEE
LORD JUSTICE BIRSS
and
SIR CHRISTOPHER FLOYD

- -

Between :

(1) NAVNIT SAVADAS KESHWALA **(2) KIRAN MAHESH SHARMA**	**Claimants and Respondents**
- and -	
(1) SHARDA BHALSOD **(2) JAYSHREE BHALSOD**	**Defendants and Appellants**

- -
- -

Stephen Taylor (instructed by **Rich and Carr Solicitors**) for the **Appellants**
Soofi Din (instructed by **Bond Adams LLP**) for the **Respondents**

Hearing date: 4 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 15 April 2021

Lord Justice Nugee:

Introduction

1. This second appeal concerns relief from forfeiture of a lease of mixed commercial and residential premises in Leicester. Because the Appellants in this Court were the Respondents below, and vice-versa, it is more convenient to refer to the parties as **"the Landlords"** (Mrs Sharda Bhalsod and Mrs Jayshree Bhalsod) and **"the Tenants"** (Mr Navnit Keshwala and Mr Kiran Sharma) respectively.

2. On 13 September 2018 the Landlords, taking advantage of a minor shortfall in the payment of rent for the June 2018 quarter, forfeited the lease by peaceable re-entry for non-payment of rent. Nearly 5 months later on 4 February 2019, no application for relief having been made, the Landlords re-let the premises. On 26 February 2019 the Tenants applied to the County Court for relief. The application was heard by HHJ Hampton who gave a thorough and careful judgment on 10 January 2020, in which she described neither party as presenting a particularly appealing position to the Court, and the matter as finely balanced, but ultimately dismissed the claim for relief. I will have to look at the reasons for her decision in detail, but a significant factor was the delay of the Tenants in applying for relief, or even effectively notifying the Landlords of their intent to do so.

3. The Tenants appealed to the High Court. The appeal was heard by Martin Spencer J sitting in Birmingham. In a judgment dated 4 September 2020 he allowed the appeal. The effective ground on which he did so was that the Tenants had applied for relief within 6 months after the forfeiture, and that in those circumstances they should be treated as having applied with reasonable promptitude, and the fact that they had delayed until nearly the end of the 6 month period was not capable of amounting to exceptional circumstances, such as to defeat the claim for relief.

4. The Landlords sought permission for a second appeal which was granted, limited to one ground, by Floyd LJ on 8 December 2020. The ground for which he granted permission is that Martin Spencer J erred in his approach to delay, and that there was no proper basis for disturbing HHJ Hampton's decision.

5. In my judgment this ground is made out, and I would allow the Landlords' appeal and restore the judgment of HHJ Hampton.

Background

6. By a lease dated 12 December 2008 Rachel Rowley let 89 Narborough Road, Leicester to the Tenants for a term of 20 years from 17 March 2008 at an initial rent of £8,000, subject to 5-yearly upward only rent reviews, payable by equal quarterly instalments in advance on the usual quarter days. The lease contained a forfeiture clause in conventional terms enabling the landlord to re-enter if, among other things, any part of the rent should be unpaid for 21 days after its due date whether formally demanded or not.

7. The property consisted of a lock-up shop on the ground floor and residential accommodation on the upper floors. The Tenants were already in business together providing financial services under a franchise from Halifax plc from premises in

Derby, and took the property at 89 Narborough Road to open a second branch. They spent a considerable sum of money refurbishing it to Halifax's standards, and later opened a third branch in Melton Road, Leicester. They operated this business together until 2011 when Halifax terminated their franchise (along with many others). That led to the Tenants agreeing to go their separate ways, severing their partnership. They agreed that Mr Keshwala would become the sole owner of the business at Melton Road, while Mr Sharma would take over both 89 Narborough Road and the Derby premises; Mr Sharma would be responsible for the outgoings at 89 Narborough Road and would indemnify Mr Keshwala for them.

8. In 2015 the reversion was bought by the Landlords. The transfer was dated 30 April 2015 and the Landlords were registered at HM Land Registry on 3 July 2015. HHJ Hampton found that although the property was put into the names of the two Mrs Bhalsods, the actual running and management of the property was carried out by Mr Anil Bhalsod, Mrs Sharda Bhalsod being his sister-in-law and Mrs Jayshree Bhalsod being his wife.

9. Shortly after acquiring the property, on 21 July 2015, the Landlords forfeited the lease for arrears of rent by taking peaceable re-entry. Mr Sharma (acting, at least purportedly, together with Mr Keshwala) gave prompt notice of his intention to apply for relief and duly applied to the County Court, and by a consent order dated 10 November 2015 relief was granted on terms that just under £5,000 in arrears, costs and bailiff's fees was paid, which it was.

10. In the present proceedings the Landlords asserted that the application for relief in 2015 had been brought without Mr Keshwala's authority, and applied to amend their defence by adding a claim to have the consent order set aside on that basis. The application to amend was based on some correspondence in 2018 between solicitors acting for Mr Keshwala, Crane and Walton LLP, and the solicitors who brought the application for relief in 2015, Bond Adams LLP, which certainly suggested that the latter had only been acting for Mr Sharma and not for Mr Keshwala. But in the present proceedings Mr Keshwala's evidence was that he had in fact agreed to assist Mr Sharma, albeit on terms that all the costs fell on Mr Sharma; the application to amend was refused at an interlocutory stage; and at trial HHJ Hampton cut short the evidence and argument on the point on the basis that it was all past history and had no effect on anything she had to decide.

11. Despite Mr Sharma successfully regaining possession of the premises, the business he was then running from them, which was that of a travel agency, had been severely interrupted by the forfeiture and although he attempted to re-start it, this failed. He never managed to start another one in the ground floor before the forfeiture in 2018 although (see below) he was about to do so.

12. The residential upper part was unoccupied and Mr Sharma decided to refurbish it for student accommodation. The work was completed in June 2016 at some expense and he applied to Leicester City Council for a licence to let it as a house in multiple occupation. That was in the event not forthcoming as the Council had decided to stop granting any such licences in the area, but unwisely Mr Sharma had in the meantime let the property to students. That led to the Council in March 2018 serving a planning contravention notice on the Landlords, and in June or July 2018 requiring Mr Sharma to have the flat vacated. HHJ Hampton found that all the students had vacated before

the matters with which this case is concerned.

13. Mr Sharma also decided to make use of the ground floor again by opening a hairdresser's or barber's business. Again he spent considerable sums on refurbishing and fitting out the property, and by the time of the forfeiture in September 2018 it was practically ready for opening.

14. There is one other matter of background before coming to the forfeiture itself. As already referred to, the arrangement between Mr Keshwala and Mr Sharma when they went their separate ways in 2011 was that Mr Sharma would be solely responsible for the property at 89 Narborough Road. Indeed at the time of the 2015 forfeiture, Mr Keshwala asked Mr Sharma to remove his name from the lease. Mr Sharma approached Mr Bhalsod to have Mr Keshwala replaced by Mr Sharma's uncle, Mr Kirit Mistry, who was personally known to Mr Bhalsod, but Mr Bhalsod was unreceptive to the suggestion.

15. Mr Keshwala's continuing liability as one of the named tenants under the lease arose again in summer 2018 when he received demands from Leicester City Council for unpaid non-domestic rates for the property. The details do not matter but it appears that there was a Magistrates' Court summons, and bailiffs also turned up at his home, about which he was obviously very upset. The amount outstanding was not trivial – it was over £22,000. That led to his instructing Crane and Walton LLP, and the correspondence between them and Bond Adams LLP, described as "rather hostile" by HHJ Hampton, which was still ongoing at the time of the forfeiture. There was also evidence from Mr Bhalsod, which we were told was neither contradicted nor challenged in cross-examination, that in July 2018 Mr Keshwala had contacted him and said that he was being chased for unpaid business rates for 89 Narborough Road, that he had nothing to do with the premises, and had not done so for many years.

The forfeiture

16. The rent had not been reviewed which meant that the quarter's rent due on 24 June 2018 was £2,000. Mr Sharma was in the practice of getting his sister to pay the rent by transferring it to an account in the name of the Landlords' property agents, Andrew Granger & Co (**"AG"**), who had acted for the Landlords throughout their ownership of the property. Unfortunately by mistake his sister only paid £1,500 on this occasion, and there was therefore a £500 underpayment. AG did not react to the underpayment. Nor did they mention the £500 arrears when, on 1 September 2018, they sent an invoice for the next quarter's rent due on 29 September 2018. HHJ Hampton found that Mr Sharma's sister did not detect the underpayment, and Mr Sharma did not know about it. Mr Bhalsod however knew about it, and when AG were about to send out a statement of arrears to Mr Sharma, he instructed them not to.

17. On 13 September 2018 the Landlords forfeited the lease by instructing bailiffs to effect peaceable re-entry. Mr Bhalsod said that he had ascertained that the residential part was empty; the shop had been closed for some time, although (unknown to the Landlords) it was being refurbished behind whitewashed windows.

18. It is helpful to set out in some detail the communications that thereafter took place:

    (1) The first that Mr Sharma knew of the forfeiture was when his decorator found

himself locked out of the premises. A notice placed on the door by the bailiffs indicated that "your Landlord" had peaceably re-entered and was now legally occupying the property, and directed any enquiries to the Landlord's solicitors, giving their telephone number. It did not indicate the ground on which the lease had been forfeited.

(2) Mr Sharma telephoned the solicitors. He was told by them to speak to AG. His uncle Mr Mistry who was on friendly terms with Mr Bhalsod also contacted him on 16 September 2018 by text message suggesting a meeting; Mr Bhalsod did not respond.

(3) On 17 September 2018 Mr Sharma's sister paid the £500 to AG's account.

(4) On 24 September 2018 Mr Sharma e-mailed AG saying that further to the payment of the £500 he was ready to pay the £2000 due on 29 September and complaining that they had neither sent a reminder for the £500 underpayment nor mentioned it on the invoice for the September rent.

(5) On 4 October 2018 Mr Bhalsod sent Mr Sharma notices under the Torts (Interference with Goods) Act 1977 to the effect that the goods found on the property (which included barber's chairs and other furniture) could be collected within the next 2 weeks. Mr Sharma did not respond and did nothing to go and collect the goods.

(6) On 9 October 2018 Mr Sharma e-mailed AG again to the effect that they had failed to tell him how to pay rent and that "Accordingly I am now forced to make an application to the court". He complained of a lack of response from them and that it was the fourth e-mail he had sent them.

(7) That elicited a response from a Mr Skipworth of AG on 14 October 2018 to the effect that he had specific instructions from his client not to take any action as he was dealing with the matter, and asking Mr Sharma to forward any correspondence to Mr Bhalsod. The e-mail was copied to Mr Bhalsod at "anil.bhalsod@gmail.com".

(8) So far as the correspondence is concerned there is then a gap of over 3 months until late January. Mr Sharma's evidence to HHJ Hampton was that he had tried to contact Mr Bhalsod but that Mr Bhalsod would not respond. She appears to have accepted that evidence as she said that she found it not surprising given that Mr Bhalsod had adopted a harsh and unyielding attitude. But there was no other evidence of any attempt by Mr Sharma or his solicitors to contact Mr Bhalsod, or the Landlords, or the solicitors named on the notice of forfeiture, between 14 October 2018 and 25 January 2019.

(9) On 25 January 2019 Mr Rafique Patel of Bond Adams LLP, who had been instructed by then, at least by Mr Sharma, sent an e-mail saying that there had been some delay in lodging their forfeiture application as signatures had to be obtained from India (this being a reference to Mr Keshwala who was then in India). The e-mail was sent to Mr Skipworth and another individual at AG. It was also meant to have been sent to Mr Bhalsod but the address used for him, "nil.bhalsod@gmail.com", was unfortunately incorrect in omitting the initial

> "a". Further e-mails the same day to AG and to Mr Bhalsod seeking to establish what was due had the same error. On 27 January 2019 Mr Skipworth replied confirming that AG were instructed to take no further action in relation to the property. This too was copied to the incorrect address for Mr Bhalsod, and HHJ Hampton accepted that the error in his e-mail address went undetected: she found that although AG were aware of Mr Sharma's position, they were no longer instructed and that Mr Bhalsod was not directly alerted by the e-mails.

19. On 4 February 2019 the Landlords re-let the ground floor commercial premises to a Mr Navjot Jakhu for a term of 3 years, subject to one month's break clause on either side on or after 7 August 2020, at an annual rent of £6,000. They also re-let the residential premises to a Mr Thanga on an assured shorthold tenancy. The Landlords had been served on 14 January 2019 with a Magistrates' Court summons for non-domestic business rates in a sum of over £2,000, and Mr Bhalsod's evidence was that there being no rental income from the property they could not afford to pay this, and were struggling to pay other costs, which is why the decision was made to re-let the property. HHJ Hampton found that at the time of re-letting Mr Bhalsod was unaware that the Tenants had been doing anything, or that it was intended to make an application for relief.

20. On 13 February 2019 Mr Patel sent an e-mail to Mr Bhalsod (this time correctly addressed) referring to the re-letting and indicating that a claim would follow. The claim for relief from forfeiture was then issued on 26 February 2019.

Judgment of HHJ Hampton

21. HHJ Hampton heard the trial, including oral evidence, over two days on 8 and 9 January 2020, and gave a long and careful judgment on 10 January 2020. At [1]-[52] she dealt with the facts. In the course of setting out the facts she made a number of adverse comments about Mr Bhalsod. She described him as "unnecessarily guarded" about the arrangement between him and the named Landlords in relation to the premises [7]; found his evidence "unsatisfactory in many respects" [19], in some respects "evasive" [51], and in one particular matter "simply untruthful" [52]; described the decision to forfeit a 20-year lease with 10 years still to run for £500 arrears as "very harsh" [30]; found that the conduct of Mr Bhalsod in forfeiting the lease for such a small sum, instructing solicitors to tell the Tenants to deal with the agents, and at the same time withdrawing instructions from the agents was such as to attract the Court's disapproval [38]; and found that he was trying to make life difficult for the Tenants [51].

22. At [54]-[73] she dealt with a point on the lawfulness of the forfeiture which is no longer in issue. She found that it was "harsh business practice, even sharp practice in a modern environment" to forfeit for a fraction of the rent when your agent has already furnished the invoice for the following quarter's rent without making any reference to the arrears and without giving the tenant any notice of what you are about to do [73]; but she had no hesitation in finding that the forfeiture although harsh was nevertheless lawful [72].

23. At [74] she turned to the remaining issue, namely whether relief should be granted, which she said was a discretionary remedy. At [76] she said that neither party

presented a particularly appealing position to the court. As to the Landlords, she reiterated that they had acted harshly and found that they were determined to get the Tenants out of the property [76]; said that once Mr Bhalsod had realised there was a shortfall in the rent, he had seen his opportunity to swoop and to lock the Tenants out [77]; and having forfeited by re-entry that he then made life difficult for the Tenants to make good the default, withdrawing instructions from the agents and failing to respond to informal approaches [78].

24. As to the Tenants, she described their position as also unappealing. She referred to the delay between October 2018 and the eventual resumption of correspondence in late January 2019 [79]. She had previously pointed out that that delay was unexplained, save that Mr Sharma had said he was having difficulties getting hold of Mr Keshwala. There was no application for relief; nor was there any correspondence from Mr Sharma or his solicitors to the Landlords or to Mr Bhalsod saying that an application for relief would be forthcoming once they could contact Mr Keshwala. There was simply silence [39]-[40]. When the correspondence was started again in late January, it was unfortunate that it had been sent to an incorrect e-mail address for Mr Bhalsod and not followed up with hard copies being sent to the Landlords personally [79].

25. She next dealt at some length with another point that is no longer in issue, namely whether she had no discretion to grant relief because being a jointly held lease, it was necessary for both Tenants to apply for relief and it had not been shown that Mr Keshwala was in fact joining in the application. Mr Keshwala, although giving a witness statement, did not attend trial, being in India at the time, and it was suggested that the Court should conclude that it had not been proved that he was a party to the proceedings. HHJ Hampton rejected this, largely on the grounds that it had not been squarely pleaded, although she also accepted Mr Sharma's evidence that Mr Keshwala was prepared to co-operate in regaining the tenancy [80]-[89], [95]. She therefore dismissed the argument that she had no discretion in the matter.

26. But she said that Mr Keshwala's position was of relevance to the exercise of her discretion. Having referred to the correspondence in 2018 between Crane and Walton LLP and Bond Adams LLP, she concluded that although Mr Keshwala was prepared to co-operate, it was quite clear that he wished to have nothing to do with the property [95]. That was potentially relevant to the Landlords because if Mr Sharma was in potential financial difficulties (as it appeared he had been, having to look to friends and relatives to help him set up the new business), the Landlords would have to look to Mr Keshwala and would be faced with someone who had no ongoing interest in the premises and was very reluctant to take on any responsibility [96]. In addition she found that Mr Keshwala had a history of making himself absent – it had taken some time to obtain his signature to start the proceedings for relief, and he had not attended trial, and there was also a suggestion he had made himself absent when the demand for rates was made [97]-[98].

27. Then at [102] she considered the delay. She accepted that even substantial delay did not mean that relief could not be granted, saying that there were numerous cases, and that one of the relevant factors was whether the premises had been re-let [102]. She considered and distinguished a case relied on by the Tenants, *Pineport Ltd v Grangeglen Ltd* [2016] L&TR 28 (***"Pineport"***), in which Chief Master Marsh had granted relief despite a 14-month delay [103]-[106]. She then referred to the lack of

contact between the Tenants and the Landlords until February 2019. She pointed out that at the time of the forfeiture Bond Adams LLP were acting for Mr Sharma in relation to the correspondence with Crane and Walton LLP over the business rates, but he did not ask them to write formally to the Landlords, or their solicitors, making it clear that an application for relief would follow [107]. She referred to the fact that the e-mails in January, unfortunately sent to the wrong address, were not followed up by hard copies to the Landlords' own addresses (which could be obtained from the registered title at HM Land Registry) [108]. She also referred to the fact that the Landlords were faced in January 2019 with the need to pay business rates and at that stage knew nothing about the Tenants' intentions [109].

28. At [111] she commented that she was not really dealing with which of the arguments she found most appealing "but, rather dismally, it is which of the arguments I found least unappealing." She then set out the factors on each side, namely on the Tenants' side the delay which was not properly explained [112]; the failure to put the Landlords formally on notice [112]; Mr Keshwala's unwillingness to have anything to do with the property [113]; Mr Sharma's management of the property including his failure to pay the business rates [114]; and the difficulties in contacting Mr Keshwala who was absent in India in a crucial period. On the Landlords' side she referred to the very harsh decision to forfeit the premises with 10 years left to run over £500, and to her finding that Mr Bhalsod was a most unimpressive and evasive witness, who had "manipulated the situation to his advantage, but he has not done so unlawfully" [116].

29. Her conclusion was summarised at [118]-[119] which I cite in full:

> "118. However, the Claimants' inactivity between October and January is not sufficiently explained. I am not comfortable with the inconsistencies that there are in [Mr Keshwala's] position as demonstrated in the correspondence. His demonstrated wish to absolve himself of any liability is inconsistent with his purported support of [Mr Sharma] in this application for relief. There is discomfort in imposing on [Mr Keshwala] a liability he plainly does not want, and on the [Landlords] a tenant who is difficult to get hold of and who does not wish to have any liability in respect of the property. If [Mr Sharma] gets into difficulties again, he must have been in some sort of difficulty not to have paid the business rates in the summer of 2018, the [Landlords] are left with the other reluctant tenant who may not be in the jurisdiction, if any need arises to enforce any financial default on the part of [Mr Sharma].
>
> 119. Taking all those matters into account, and as I have said, if this application for relief had been made promptly or at least the [Tenants] had forewarned the [Landlords] promptly in September or October 2018 that there would be an application for relief from forfeiture, I have no doubt that the court would have no difficulty in granting relief. In the circumstances of the case and for the reasons that I have discussed, I find that although the matter is finely balanced, it is not appropriate to grant relief from forfeiture in this case, and the [Tenants'] claim is dismissed."

30. By her Order dated 10 January 2020 she therefore dismissed the claim. By a subsequent Order dated 29 January 2020 she recited that she had no jurisdiction to grant permission to appeal as the lower court can only grant permission at the hearing at which the decision to be appealed was made, and permission was not asked for on 10 January 2020 when the judgment was given. In the absence of any formal

adjournment of the hearing at which judgment was delivered that was correct: see CPR r 52.3(2)(a).

Judgment of Martin Spencer J

31. Permission to appeal to the High Court was given by Martin Spencer J on 5 June 2020, and he heard the appeal in Birmingham on 16 July 2020, handing down a reserved judgment at [2020] EWHC 2372 (QB) on 4 September 2020.

32. Having set out the facts, the decision of HHJ Hampton, and the arguments for the parties, he began his discussion at [15] by considering a point raised by the Landlords by Respondent's Notice that the claim should have been dismissed as it had not been made by both Tenants. He dismissed this as having no merit. Although the Landlords sought to rely on the point again in their appeal to this Court, Floyd LJ refused permission on this ground and no more need be said about it.

33. At [16]-[20] he dealt with the main argument on the appeal. He accepted the argument of Mr Soofi Din for the Tenants that the proviso for re-entry was to be treated as no more than security for the payment of rent so that if rent is paid relief should follow unless there is some exceptional reason why it would be unjust to grant relief [16]. At [17] he said that the question for the learned judge should have been:

> "whether the delay in this case comprised such exceptional circumstances as to justify the refusal to grant relief sought."

Having referred to a number of cases at [17]-[18] (*Howard v Fanshawe* [1895] 2 Ch 581 (***"Howard"***), *Billson v Residential Apartments Ltd* [1992] 1 AC 494 (***"Billson"***), and *Gibbs v Lakeside Developments* [2018] EWCA Civ 2874 (***"Gibbs"***)), he said this at [19]:

> "In my judgment, what these cases, and the other cases cited by Mr Din, show is that although an application for relief from forfeiture may be brought more than six months after possession has been taken by the landlords so long as the elasticity of "reasonable promptitude" has not snapped, an application brought within six months is to be taken as having been brought with "reasonable promptitude". In those circumstances, the factor relied upon by the learned judge in refusing to grant the relief sought, namely the delay within six months, was not capable of amounting to the kind of exceptional circumstances which it is necessary for a landlord to show when inviting the court to refuse relief despite the application having been brought within six months. It may be of significance that, in reaching her decision, the learned judge made no reference to the guidance to be derived from the statutory six month time limit."

At [20] he said that the re-letting should be no bar to the granting of relief as the residential premises had been vacated by the date of the hearing, and as regards the ground floor business premises the Tenants had said they would be content with a reversionary lease. He therefore allowed the appeal and granted relief from forfeiture.

Ground of appeal

34. The sole ground of appeal for which Floyd LJ granted permission was that Martin Spencer J erred in his treatment of the issue of delay. This ground is elaborated in a number of respects, but the essence of it is that he was wrong at [17] to conflate the

issue of delay with "exceptional circumstances", and wrong at [19] to say that an application brought within 6 months was to be taken as having been brought with "reasonable promptitude"; that HHJ Hampton properly applied the relevant principles; and that there was no proper basis for disturbing the exercise of her discretion.

35. The Tenants have served a Respondent's Notice which, in its amended form, seeks to uphold the decision of Martin Spencer J on the basis that HHJ Hampton should have taken into account certain matters, and was wrong to take into account other matters. I give the details below.

The legal framework

36. The law in relation to relief from forfeiture is unfortunately made more complex than it might otherwise be by the fact that the applicable legal framework depends on a number of variables, such as whether the forfeiture is for non-payment of rent or for breach of other covenants; whether the landlord is enforcing the right to possession through court proceedings or has peaceably re-entered; whether proceedings are in the High Court or County Court; whether the Court is exercising a statutory or equitable jurisdiction; and whether the application is by the tenant or by a sub-tenant or mortgagee. It is necessary when reading the authorities to keep this variability in mind and be clear as to precisely what issue the Court was dealing with.

37. In the present case we are concerned only with forfeiture for non-payment of rent. There is an unusually long history of statutory intervention in this area. It is summarised in the judgment of Sir Nicolas Browne-Wilkinson V-C in *Billson* at 511C-512D. Before the Landlord and Tenant Act 1730 the Court of Chancery claimed power to relieve against forfeiture without limit of time. The 1730 Act was designed to prevent such relief being given more than 6 months after judgment had been recovered. It was in effect repealed and re-enacted in ss. 210 to 212 of the Common Law Procedure Act 1852 (**"the 1852 Act"**) which, as amended, are among the very few provisions of that Act still in force. By s. 210 if a landlord recovers judgment for possession, a tenant who does not pay the arrears of rent and costs and apply for relief within 6 months is barred from relief; s. 211 requires the tenant to pay into court the arrears and costs claimed; and s. 212 enables a tenant to be relieved if he pays or tenders the arrears or costs before trial. In *Gill v Lewis* [1956] 2 QB 1 (***"Gill"***) Jenkins LJ held that s. 212 differs from ss. 210 and 211 by conferring a new substantive right on the tenant to relief. The 1852 Act is, as Browne-Wilkinson V-C says, still the basic statute regulating relief from forfeiture for non-payment of rent.

38. But the 1852 Act does not apply to all cases. In particular ss. 210 to 212 are only concerned with cases where the landlord has proceeded, or is proceeding, in court, and have no application to cases of peaceable re-entry; ss. 210 and 211 are also expressly limited to cases where at least one half year's rent is in arrear. The High Court has a statutory jurisdiction in s. 38 of the Senior Courts Act 1981 to grant relief where the landlord is proceeding in the High Court (whatever the amount of the arrears); but there is no such statutory provision available to the High Court in cases of peaceable re-entry, and in such a case it retains, and exercises, its equitable jurisdiction inherited from the Court of Chancery.

39. A succession of cases has established that the equitable jurisdiction is not subject to

any strict time limit. In *Howard* Stirling J at 588f suggested that a court of equity might possibly say the action for relief must be brought within 6 months, by analogy with the 1852 Act; but in *Thatcher v C H Pearce & Sons (Contractors) Ltd* [1968] 1 WLR 748 (***"Thatcher"***), Sir Jocelyn Simon P said at 755F that he had rarely come across more guarded wording, and in the case before him, where the tenant was in prison and without ready access to legal advice and had brought an application 6 months and 4 days after peaceable re-entry, said at 755H that it seemed to him contrary to the whole spirit of equity to boggle at a matter of days when justice indicated relief. In *Billson* at 512C Browne-Wilkinson V-C went so far as to draw the conclusion that the High Court could exercise its equitable jurisdiction to relieve in cases of peaceable re-entry "without limit of time"; but in *Gibbs* Lewison LJ said (at [44]) that he thought that was highly debatable, and (at [55]) that he considered that the approach of Nicholls and Parker LJJ, who both took a narrower view, was the correct one. What Nicholls LJ had said in *Billson* was (at 529B) that equity followed the law but not slavishly or always, and (at 530A) that courts of equity should apply by analogy the statutory time limits but not with strictness.

40. It can therefore be taken as settled law that the High Court, in exercising the ancient equitable jurisdiction to relieve for non-payment of rent in cases of peaceable re-entry, will have regard to, but not be strictly bound by, the 6 month time limit under the 1852 Act.

41. The application for relief in the present case was brought in the County Court rather than the High Court. Unlike the High Court the County Court only has the jurisdiction conferred on it by statute. The current Act is the County Courts Act 1984 which by s. 138 makes provision similar to, but not identical with, the 1852 Act. Thus s. 138(1)-(9) enable the lessee to obtain relief by paying the arrears of rent and costs into court, either before the return date or after an order for possession has been made but before it has been executed; and s. 138(9A) provides for the lessee to have 6 months after recovery of possession to apply for relief, as follows:

> "(9A) Where the lessor recovers possession of the land at any time after the making of the order under subsection (3) (whether as a result of the enforcement of the order or otherwise) the lessee may, at any time within six months from the date on which the lessor recovers possession, apply to the court for relief; and on any such application the court may, if it thinks fit, grant to the lessee such relief, subject to such terms and conditions, as it thinks fit."

42. That provision does not apply in the present case as the Landlords recovered possession without having first obtained an order. In such a case the relevant provision is s. 139(2) of the County Courts Act 1984 which enables the lessee to apply to the County Court for relief, again within 6 months from possession being taken, as follows:

> "(2) Where a lessor has enforced against a lessee, by re-entry without action, a right of re-entry or forfeiture as respects any land for non-payment of rent, the lessee may, at any time within six months from the date on which the lessor re-entered, apply to the county court for relief; and on any such application the court may, if it thinks fit, grant to the lessee such relief as the High Court could have granted."

This therefore enables the County Court to grant relief against forfeiture for non-

payment of rent within 6 months after peaceable re-entry, but not thereafter: see *Gibbs* at [42] per Lewison LJ. This was the jurisdiction which HHJ Hampton was being asked to exercise.

Can a delay of less than 6 months be potentially relevant to the grant of relief?

43. In support of the appeal, Mr Stephen Taylor, who appeared for the Landlords, took issue with two propositions of law set out by Martin Spencer J, namely (i) that at [17] of his judgment where he said that the question should have been whether the delay amounted to such exceptional circumstances to justify refusal of relief and (ii) that at [19] where he said that an application brought within 6 months was to be taken as having been brought with reasonable promptitude (see paragraph 33 above). Mr Taylor submitted that neither proposition was supported by authority.

"Exceptional circumstances"

44. The phrase "exceptional circumstances" comes from *Gill*. This was not a case about delay at all. It was a case where the two tenants had defaulted in payment of the rent, and the landlord took proceedings in the High Court, and signed judgment in default against one of them. That was on 17 May 1955. The arrears were £412 10s, of which £400 had been paid before the signing of judgment, and the small balance was subsequently paid. The tenants applied for relief on 13 July 1955, that is less than two months after judgment had been signed, and were granted it both by the Master and on appeal by the Judge. On the landlord's further appeal to this Court, the landlord conceded that in the ordinary way the Court will make the order as a matter of course when satisfied that the landlord has received, or has been tendered, all that is due to him for rent and costs, but submitted that this was not wholly inflexible and that the Court could have regard to the conduct of the tenant and refuse relief in its discretion (see at 6).

45. Jenkins LJ in fact decided the case on the basis that the judgment against one only of two tenants was ineffective, that the application for relief was therefore brought under s. 212 of the 1852 Act, and that the tenants were entitled to it, seemingly as of right (see at 8-9). But he went on to consider what the position would have been had the judgment been regular, and s. 212 inapplicable. In such a case the Court would have been exercising a discretionary jurisdiction. He accepted that if there had been intervening dealings with the property it might be inequitable to grant relief (as to which see below). But where there had been no change of position, the general position was as stated by Lord Esher MR in *Newbolt v Bingham* (1895) 72 LT 852 (***"Newbolt"***), namely that:

> "If, at the time of the application, the position is not altered, so that no injustice will be done, I think, if the conditions mentioned in the section are complied with, that, according to the settled practice in equity, there is no longer a discretion in the judge, but that he ought to make the order. It does not matter whether it is called discretionary or not, if the discretion ought always to be exercised in one way."

In those circumstances, Jenkins LJ said (at 13) that he did not think it would be generally speaking legitimate to take into account other breaches of covenant. His conclusion was as follows (at 13-14):

> "As to the conclusion of the whole matter, in my view, save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant.
>
> But there may be very exceptional cases in which the conduct of the tenants has been such as, in effect, to disqualify them from coming to the court and claiming any relief or assistance whatever. The kind of case I have in mind is that of a tenant falling into arrear with the rent of premises which he was notoriously using as a disorderly house: it seems to me that in a case of that sort if the landlord brought an action for possession for non-payment of rent and the tenant applied to the court for relief, the court, on being apprised that the premises were being consistently used for immoral purposes, would decline to give the tenant any relief or assistance which would in any way further his use or allow the continuance of his use of the house for those immoral purposes. In a case of that sort it seems to me that it might well be going too far to say that the court must disregard the immoral user of the premises and assist the guilty tenant by granting him relief."

On the facts however he did not think the matters relied on by the landlord (previous default in paying rent, difficulty of service and the conviction of one of the tenants for indecent assault committed in one of the two houses let) were enough to justify refusing relief.

46. Hodson LJ gave a short concurring judgment, in which he agreed that the case actually fell to be decided under s. 212 of the 1852 Act. But he too went on to consider what the position would have been had it been an application for discretionary relief. His conclusion was expressed as follows (at 17):

> "…that which I think the court must always keep in mind, that there may be cases where the court will refuse relief because the conduct of the applicant for relief is such as to make it inequitable that relief should be given to him. Particularly must that be so where his conduct is in relation to the premises in question – as in the instance which my brother gave, where a tenant is supposed to have been conducting the premises as a disorderly house; it could hardly be thought, I should suppose, in such a case, that the court would grant relief."

On the facts, he thought that the Court would not interfere with the exercise of the Judge's discretion. Singleton LJ agreed without adding anything.

47. It can be seen that the actual decision was that no exercise of discretion was involved, which means that everything said about discretionary relief was strictly speaking *obiter*, but I would accept that the law is as stated by Jenkins and Hodson LJJ. That can be summarised as that in a simple case, where there have been no intervening dealings with the property or any other change of position, the Court will ordinarily grant relief to a tenant on payment of rent and costs; the Court will not usually refuse relief on the ground of other breaches of covenant, which will generally be irrelevant; but that there may be cases (referred to by Jenkins LJ but not by Hodson LJ as "exceptional circumstances") where the Court will refuse relief because of the

tenant's conduct.

48. That statement of the law is not in terms addressed to the question of delay which, as I have said, did not arise on the facts. But I think it does justify the proposition that if all that has happened is that the landlord has forfeited and then done nothing with the property – just "stood by to await events" as Chief Master Marsh described the landlord in *Pineport* as having done (at [63]) – delay by itself will be unlikely to justify the Court in refusing relief. As appears below, however, the present case was not a case which was like that, nor was it one where HHJ Hampton refused relief on the ground of delay alone.

"Reasonable promptitude"

49. As set out above, there have been a number of cases which have established that the High Court, in the exercise of its equitable jurisdiction, will have regard to, but not be strictly bound by, the 6 month time limit. It was in this context that the phrase "reasonable promptitude" appears to have entered the jurisprudence: Mr Din told us that his researches indicated that it was first used by Simon P in *Thatcher*, where he said (at 756A-C):

> "I think that a court of equity – and it is such jurisdiction that I am exercising now – would look at the situation of the plaintiff to see whether in all the circumstances he acted with reasonable promptitude. Naturally it would also have to look at the situation of the defendants to see if anything has happened, particularly by way of delay on the part of the plaintiff, which would cause a greater hardship to them by the extension of the relief sought than by its denial to the plaintiff.
>
> The plaintiff was in prison, not easily having access, even in these days, to competent advice. In my view he did all that he could do in the circumstances, with all the expedition that he could reasonably command; and I think that he should have the relief that he claims."

50. The phrase was picked up by Nicholls LJ in *Billson*. *Billson* was another case of peaceable re-entry, although in this case not for non-payment of rent but for breach of covenant. (Nicholls LJ dissented in the result, and although the House of Lords reversed the Court of Appeal, it did so on a quite different basis, but as already referred to, Lewison LJ in *Gibbs* said that he considered his analysis was the correct one). What Nicholls LJ said at 530A was:

> "The concurrent equitable jurisdiction can only be invoked by those who apply with reasonable promptitude. What is reasonable will depend on all the circumstances, having due regard to the statutory time limits….
>
> In the present case, the landlords entered by stealth. The property was not empty and unused. Workmen were carrying out alterations on behalf of the tenant. Without any warning, the landlords moved in on 18 July. As was to be expected, the tenants ignored the new locks and the notices. The landlords issued their writ on the following day, and the tenants' counterclaim for relief was served a week later, on 26 July. In my view the tenants acted with promptitude, and the court can and should entertain its application for relief."

51. In *Pineport*, Chief Master Marsh said at [64] that reasonable promptitude was an elastic concept which was capable of taking into account human factors, and on the

particular facts of that case, although recognising that the very lengthy period of delay (14 months after peaceable re-entry) was a matter of very great difficulty for the claimant, did grant relief. In *Gibbs* however Lewison LJ said at [58] that he had considerable doubts whether he had been right to do so, and that in *Gibbs* itself, where there had been a delay of a year and a half, the elasticity of reasonable promptitude had snapped.

52. Mr Taylor submitted that there was no principle that an application within 6 months was to be regarded as brought with reasonable promptitude. In some circumstances a period of more than 6 months might be regarded as reasonably prompt; in others a tenant who delayed for less than 6 months might not be regarded as reasonably prompt. Mr Din submitted that as there was an express 6-month time limit in the County Court, this was a limitation period, and delay within the limitation period was not relevant.

53. Most of the authorities I have referred to do not really address this question, being, as can be seen, concerned with the question whether delay beyond the 6 months prevented the Court from exercising its equitable jurisdiction. None of them squarely raised the question whether a tenant who applies within the 6 months will be taken to have acted reasonably promptly.

54. But there are repeated indications in the authorities that a tenant who leaves it to the end of the 6 months will not necessarily be taken to have acted promptly, and that such a delay can be a relevant factor. The earliest such case to which we were referred was *Stanhope v Haworth* (1886) 3 TLR 34 (***"Stanhope"***) where a landlord forfeited a lease of a colliery for non-payment of rent, took proceedings in the High Court, and obtained possession under a default judgment. The tenant waited until "just before the end of the six months" and made an application for relief under s. 210 of the 1852 Act. In the meantime the landlord had kept up the colliery at considerable expense, and other parties who proposed to take a lease of it had laid out money in purchasing plant to work it and were in possession of it. The Divisional Court refused to grant relief, thinking that it would be "monstrous" to do so. This Court upheld that decision.

55. What is of interest for present purposes is what the Court said about delay. Counsel for the tenant argued that having applied within the six months limited by statute, relief should be given on equitable terms (which I take to mean the normal terms of payment of arrears and costs) but Lopes LJ is reported as saying in the course of argument that the "long delay", of which no explanation had been given, would make it inequitable; and Lindley LJ that relief was not necessarily to be granted within the 6 months: the statute says that it shall not be granted after the 6 months, but it may be inequitable even within the 6 months. Similar statements are found in what was reported to have been said in all three judgments. Lord Esher said:

> "…the defendant, having judgment against him, had made no application until just before the end of the six months, and in the meantime the position of the plaintiff had become altered, as he had to keep up the colliery at considerable expense, and other parties who offered to take it had laid out money in purchasing plant to work the colliery and were now in possession. It would be unjust now to allow the tenant to dispossess them and resume possession of the colliery."

Lindley LJ also said that the tenant had delayed his application until just before the end of the 6 months and in the meantime the position of the plaintiff landlord was altered:

> "The plaintiff had in the meantime kept the colliery up, and had entered into an arrangement with other parties to let the colliery to them. There was no explanation of the delay by the tenant except that he had not had the money. That was no reason for allowing him now to have relief to the prejudice of other parties, and it would be unreasonable to give him such relief."

Lopes LJ said that he agreed with the Divisional Court that it would be monstrous to give the tenant relief:

> "Relief ought not to be granted if the landlord and other parties interested could not be put in the same position as before, and here that was impossible and the relief unjust and inequitable."

It can be seen therefore that all the members of the Court took into account the delay on the part of the tenant, albeit it was the fact that that delay had led to the landlord and third parties altering their position which made it inequitable to grant relief.

56. *Stanhope* has been referred to in other decisions of this Court. In *Newbolt*, Lord Esher MR said that he thought it applied if, at the time relief is asked for, the position is altered, so that relief could not be given without injury to third parties; and Smith LJ said that if some new interest had been created before the application, the Court would refuse to interfere. It was referred to again by Jenkins LJ in *Gill* as follows (at 10):

> "It will be observed that in that case the landlord and those dealing with him had altered their position on the footing that the lease to the party seeking relief was at an end, and they had been led to do that because the tenant had waited until almost the end of the period of six months allowed to him before he claimed relief. So that case shows that where parties have altered their position in the meantime, and in particular where the rights of third parties have intervened, relief ought not to be granted where the effect of it would be to defeat the new rights of third parties or be unfair to the landlord having regard to the way in which he has altered his position."

57. *Stanhope* was applied in *Silverman v A.F.C.O. (U.K.) Ltd* (1988) 56 P&CR 185 (***"Silverman"***). Here the landlord forfeited for non-payment of rent and brought a claim in the High Court for possession. The tenant filed an acknowledgment of service indicating it did not intend to defend, and the landlord entered judgment in default. The tenant applied for relief but by the time of the hearing had not paid, or tendered the arrears of rent, only offering a post-dated cheque. The Master refused relief. The tenant did not indicate any intention to appeal, and the landlord, who had been negotiating a new lease for some time, let the property to a Mr Parsons the next day. On appeal Turner J dismissed the appeal holding that the landlords had "not unreasonably given the history of this matter" granted a fresh lease to Mr Parsons. A further appeal to this Court was also dismissed. Slade LJ, giving the judgment of the Court, said at 190f that the jurisdiction to grant relief was discretionary, that the question was whether sufficient grounds had been shown to interfere with Turner J's exercise of his discretion, and that a crucial question was whether he was justified in finding that the landlord had acted "not unreasonably" in executing a lease. They

held that Turner J was entitled to accept the submission that there was no reason why the landlords should have been expected to wait any longer than they did. At 192 Slade LJ expressed their conclusion as follows:

> "At the time when he accepted the lease neither Mr. Parsons nor the plaintiffs themselves would, in our judgment, have been unreasonable in thinking that the plaintiffs were in a position to confer on him a good title to the premises which they were purporting to demise. By the time when the defendants made their first tender of the sums due to the plaintiffs, very shortly before the hearing, on December 17, 1987, both the plaintiffs and Mr. Parsons had substantially altered their positions by the grant and acceptance of the new lease. Mr. Michaelson criticised the learned judge's description of the relevant passage from Jenkins L.J.'s judgment in *Gill v. Lewis* as "binding and persuasive authority." In our judgment, however, that passage and the decision in *Stanhope v. Haworth* on which it is based support the proposition that the court may, in the exercise of its discretion, properly refuse relief from forfeiture even to a tenant who belatedly tenders the full amount of outstanding rent and costs if, during the interim period, the landlord has, not unreasonably or precipitously, granted rights in the premises to third parties, on the footing that the original lease is at an end, and the court considers that, in all the circumstances, the grant of relief to the original tenants would cause injustice to the landlord or the third parties or both."

This was not a case where the tenant had delayed in issuing the application for relief, but no tender of the full amount outstanding was made until the eve of the hearing of the appeal, something that was described by Turner J as at the "eleventh-and-a-half hour".

58. Then in *Billson*, as referred to above (paragraph 50), Nicholls LJ referred to the need for reasonable promptitude, said that what was reasonable depended on all the circumstances, and then considered the particular circumstances of the case, including the fact that the tenant had applied for relief within one week, and concluded that the tenant had acted with promptitude. That certainly suggests that he did not think that a tenant could take as much time as he liked so long as he brought his application for relief in 6 months.

59. Finally, there are some pertinent comments made by Lightman J in *Bank of Ireland Home Mortgages Ltd v South Lodge Developments* [1996] 1 EGLR 91 (***"Bank of Ireland"***). Here the landlord had forfeited by peaceable re-entry for non-payment of rent on 13 March 1992, and the mortgagee of the lease applied for relief from forfeiture on 10 August 1992, that is well within the 6 months,[1] but nearly 5 months after possession was taken. The mortgagee had written to the lessor on 14 July 1992 undertaking to pay the arrears and threatening proceedings unless the lessor agreed to relief on the usual terms. The lessor did not respond and re-let the premises before it was served with the application for relief. The lessor submitted that as a matter of discretion relief should be refused because the delay of the mortgagee in commencing proceedings for relief was such as to make it reasonable for the lessors to proceed with the grant of the new lease. Lightman J dealt with this submission as follows (at

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[1] Lightman J refers (at 92) to the application having been made under s. 138(9) of the County Courts Act 1984, and (at 93) to s. 138(9A). The latter seems more appropriate. He is however reported as sitting in the Chancery Division of the High Court. Unless I have missed it, this oddity is not explained in the judgment, but nothing would appear to turn on it.

93):

> "The two principal authorities cited by the lessors make clear that any alteration of position on the part of the lessor or a third party in the interim period between the date of forfeiture and the date of the application for relief, eg the grant of a new lease, is potentially a factor of first importance in the exercise of discretion, for it may make it unjust to grant relief thereafter: whether it does or does not do so must depend on all the circumstances, and in particular the reasonableness or otherwise of the conduct of the lessor and the third party in acting as they did…
>
> Compliance with the six month time limit on applications for relief is a necessary, but not a sufficient, precondition for relief. It is incumbent on any applicant for relief, whether a lessee or a person deriving title from a lessee, to make application with all due diligence and keep the lessor informed of his intentions and not leave him in the dark, and, if there is any apparent delay, in his evidence fully to explain it. It is not the legislative policy that the premises shall be sterilised producing no return for the lessor during the six month period, let alone that the lessor shall be occasioned loss. So long as the lessor has given those entitled a reasonable opportunity to apply for relief and has reasonably formed the view that no application will be seriously pursued, he may exercise his rights as owner. What is reasonable in this context must depend on the circumstances of the case e.g. the amount of rent due, the seriousness of any breach of covenant, the cost to the lessor of retaining, and preserving the value of, the property unlet or unsold and the loss occasioned to the lessor by the delay.
>
> In the circumstances of this case, but for the receipt of the letter dated the 14th July, I might well have considered that the Lessors acted reasonably in granting the New Lease. The passage of time from the 15th April 1992 (when the Lessors informed the Mortgagee of the condition of the premises and the intention to sell) until the 19th August without any communication from the Mortgagee might reasonably have led the Lessor to believe that there would be no application for relief. But on the 14th July the Mortgagee made clear its position, and though at this stage negotiations for the New Lease were well advanced, the Lessors had every reason to believe, and on the basis of the evidence filed plainly did believe, that there would be an application by a Mortgagee well able and committed to fulfilling all the conditions for relief and there was no reason to believe that on the grant of relief the Lessors would not be restored to the same position as if there had been no breach of covenant by the Original Lessees. In these circumstances I consider that the Lessors acted totally unreasonably in thereafter ignoring and not replying to the letter; in falsely, for no reason explained in the evidence, informing the New Lessee that the period for an application for relief had expired; and in precipitately granting the New Lease and pocketing the premium, monies from heaven to which they had no moral claim. Accordingly it would be just to grant relief as against the Lessors.

60. It can be seen that Lightman J took the view that it was incumbent on an applicant for relief to act with due diligence, to keep the lessor informed of his intentions, and to explain fully any delay in his evidence; and that if it had not been for the letter of 14 July, he might well have considered that the lessor acted reasonably in re-letting. He undoubtedly proceeded on the basis that delay even within the 6-month period could be relevant to the exercise of the discretion.

61. That seems to me right. As Lightman J says, it can scarcely be thought to be the legislative policy that property should be sterilised for 6 months while a landlord waits for the tenant to decide what he is going to do. As long ago as 1886 Lopes LJ

and Lord Esher had made a similar point in *Stanhope*, Lopes LJ saying in the course of argument:

> "Do you say that the landlord is bound to keep up the colliery for the lessee when it suits him to re-enter?"

and Lord Esher adding:

> "And has he a right to resume possession in the meantime? Are they to refuse eligible offers from other parties to take a lease?"

62. In my judgment therefore there is no principle that a tenant will be deemed to have acted with reasonable promptitude so long as he brings his application for relief before the expiry of 6 months. A tenant who waits for nearly 6 months before bringing his application, keeps the landlord in the dark about his intentions, and fails to provide the Court with any explanation for the delay, may well find that the Court concludes that he has not acted with reasonable promptitude.

Conclusions on delay

63. In the light of the above, my conclusions on the question of delay are as follows.

64. If a landlord has forfeited for non-payment of rent and taken possession by peaceable re-entry, the grant of relief is always discretionary, either, in the County Court, because of the express terms of s. 139(2) ("may, if it thinks fit, grant … relief"), or, in the High Court, because it is exercising an equitable jurisdiction. In the County Court the application must be brought within 6 months; in the High Court there is no strict time limit, but the Court will have regard to the 6 months.

65. The discretion is to be exercised (in both the High Court and the County Court) in accordance with equitable principles, including the well-established principle that equity regards the right of re-entry as a security for the payment of the rent, and, other things being equal, the Court will ordinarily grant relief if the tenant pays all that is due in terms of rent and costs. If therefore all that has happened is that the landlord has taken possession and then done nothing with the premises, simply sitting back to see what happens, then the mere fact that the tenant has delayed is unlikely to be regarded as sufficient by itself to cause the Court to refuse relief.

66. But that does not mean that so long only as the tenant brings his application before the end of the 6 months, he will be treated as having acted with reasonable promptitude, or that his delay will always be regarded as immaterial. The longer that the tenant leaves it – and a fortiori if he does not have a good explanation for the delay, and fails to keep the landlord informed of his intention – the more likely it is that he will find that the Court will conclude that he has failed to act with reasonable promptitude, and the more likely it will be that intervening events will make it inequitable to grant relief. If the landlord, acting reasonably and not precipitately, has altered his position, it may be unjust to grant relief; as also it may be if the rights of third parties have intervened.

Application to the present case

67. We have had the benefit of a much fuller opportunity to consider the authorities than

was available to Martin Spencer J. With that advantage, I accept the submission of Mr Taylor that his judgment stated the position in terms that were too absolute. I consider that he erred when he was persuaded by Mr Din to proceed on the basis that because the Tenants brought their application on 26 February 2019, some 5½ months after possession was taken on 13 September 2018, they were to be regarded as having acted with reasonable promptitude and that such delay was therefore to be left out of account as of no relevance.

68. The position might be different if HHJ Hampton had refused relief on the ground of delay alone. But she did not. She expressly recognised (at [102]) that relief can be granted even if there is substantial delay, referring to, and distinguishing *Pineport*. As set out in her careful and thorough judgment, the factors that she took into account included not only the delay, but also: the complete lack of any attempt by the Tenants to communicate with the Landlords between October 2018 and January 2019 (described by her at [44] as "unexplained and inexplicable"); the fact that the delay itself had not been properly explained (at [112]); the fact that Mr Bhalsod (and by inference the Landlords) were unaware that the Tenants were doing anything and that it was intended that there should be an application for relief (at [109]); the fact that the Landlords re-let the premises because they were faced with the need to pay business rates (at [109]-[110]); the ambivalent position of Mr Keshwala who, although willing to co-operate in principle, was evidently reluctant to have anything to do with the property (at [113]); and the fact that if the Landlords needed to pursue him (as they might well do, given that she concluded that Mr Sharma might get into financial difficulties), they might have difficulties as he had proved elusive (at [114]-[115]).

69. It is true that she said (at [119]) that if the Tenants had forewarned the Landlords in September or October 2018 that there would be an application for relief, she had no doubt that the Court would have no difficulty in granting relief; but this does not mean that the only factor she took into account in refusing relief was delay.

70. In my judgment therefore the ground of appeal relied on by the Landlords is made out. The reason relied on by Martin Spencer J – that HHJ Hampton was wrong to take into account the delay – was not I think a sufficient basis to justify his disturbing the exercise of her discretion. Unless therefore his judgment can be upheld on the basis of the matters relied on by the Tenants in their Respondent's Notice, I would allow the appeal.

Respondent's Notice

71. The Respondent's Notice relies on a number of matters that it is said that HHJ Hampton ought to have taken into account, and two matters that it is said she wrongly took into account.

72. The matters that it is said she ought to have taken into account are as follows:

    (1) The forfeiture by re-entry stood to be treated as a security for the payment of rent, which rent had been paid and therefore, there being no exceptional reasons why relief ought to be refused, relief ought to have been granted notwithstanding any or all of the other criticisms levelled against the Tenants as tenants.

(2) The Tenants had expended significant money and time in converting the demised premises into residential accommodation and a hairdressing and beauty salon. A refusal to grant relief from forfeiture would result in a significant windfall for the Landlords and severe prejudice to the Tenants.

(3) As for the delay:

(a) The County Court's jurisdiction to grant relief derives from s. 139(2) of the County Courts Act 1984 which provides a limitation period of six months from forfeiture by re-entry. In these premises, save where equitable delay (laches) bars relief, any claim for relief made within 6 months of forfeiture by re-entry ought to be treated as having been made promptly.

(b) Alternatively, equity follows the law and absent any exceptional circumstances, a delay of less than six months should not, by itself, constitute a hurdle to a claim for relief from forfeiture.

(4) No prejudice, or no significant prejudice, was caused to the Landlords by reason of the delay between re-entry and the claim for relief.

(5) The Tenants had for some time agreed that as between themselves Mr Keshwala would be responsible for the premises from which he ran a business under a joint tenancy with Mr Sharma, and Mr Sharma would be responsible for the index premises from which he benefited.

73. The two matters which it is said that HHJ Hampton wrongly took into account were as follows:

(6) That by January 2019 the Landlords were unaware that the Tenants were actively seeking relief from forfeiture and would issue proceedings so soon as Mr Keshwala returned from India; this was because the Landlords were actively avoiding all contact or communication with or from the Tenants and made no effort to ascertain their intentions.

(7) Mr Keshwala's disinclination to be involved with the demised premises, in particular in their management, and such difficulties that stance might theoretically cause to the Landlords.

74. Before coming to the specifics, there are some general principles to be borne in mind. Once it is accepted that a trial judge has a discretion to exercise, an appellate court is bound to respect the exercise of that discretion in the absence of demonstrable error. Numerous authorities illustrate the restraint that appellate courts should exercise in appeals against discretionary decisions. Thus it has been said that reasons for judgment will always be capable of having been better expressed, but a trial judge's reasons should be read on the assumption that the judge knew (unless they have demonstrated to the contrary) how they should perform their functions and which matters they should take into account: see *Civil Procedure (The White Book) 2021* at §52.21.5, and cases there cited. And it has also been said that an appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables

them to claim that they misdirected themselves: *ibid*.

75. The present case is a good example of how difficult it is to demonstrate that a trial judge left out of account some factor that it is said that she should have had regard to. HHJ Hampton set out the facts in considerable detail. It is to be assumed that she had those facts in mind when exercising her discretion. Moreover, a judgment can never reproduce the entirety of the evidence that a judge has heard: here she heard oral evidence from a number of witnesses over two days, and unless the contrary can be established, it is to be assumed that all that evidence, in which she was immersed in a way that an appellate court can never be, informed her decision. Indeed she several times refers to taking everything into account: at [53], having set out the facts, she says that she has taken into account every matter in the witness statements or rehearsed by counsel in their skeleton arguments and in court, and the fact she has not referred to them all does not mean she has not taken them into account; at [74] she said that relief was a discretionary remedy, that the text books were full of examples of relief being granted or refused, and that the Court will take into account all the circumstances; and at [112] she said that she had given the matter great thought, and had considered "the learning that is found in *Woodfall*, the cases that have been put before me and the arguments that have been rehearsed" (at [112]). This is an unpromising basis on which to criticise her for not having regard to particular matters. If she does not mention something specific, that may be because she took it into account but gave it little weight, rather than because she thought, erroneously, that it was legally irrelevant.

76. With that introduction I can deal with each of the matters raised in turn. I can do so relatively briefly. As to (1) (the principle that relief is normally granted on payment of arrears and costs), Mr Din's written submissions at trial made the point that in the eyes of equity the proviso for re-entry is treated as security, and that so long as any arrears can be paid relief is normally granted. HHJ Hampton also said more than once that she had referred to *Woodfall*. The relevant paragraphs in *Woodfall* are §17.181 to 17.183.

77. At §17.181, the editors refer to the proviso for re-entry being merely security for rent in the eyes of equity; that equity was in the "constant course" of relieving against forfeiture where the tenant pays the rent and expenses; that save in exceptional circumstances the function of the Court is to grant relief when all that is due for rent and costs has been paid up; and that if the tenant pays the rent in arrear, interest and costs he is normally entitled to relief. At §17.182, the point is made that save in exceptional circumstances in determining whether to grant relief against forfeiture for non-payment of rent the Court should ignore other breaches of covenant. HHJ Hampton referred to this principle twice (at [74] and [102]), expressly referencing §17.182 of *Woodfall* at the latter, and said that she therefore left out of account Mr Sharma's breach of covenant in letting the residential part of the premises as a house in multiple occupation without a licence. At §17.183 *Woodfall* continues:

> "Relief may also be refused where the tenant has delayed in making his application and the landlord has in the meantime been put to expense in carrying on the enterprise on the property[1]; or has reasonably and not precipitately granted a new lease to a third party.[2]"

citing *Stanhope* and *Silverman* at footnotes 1 and 2 respectively.

78. In those circumstances I see no reason to think that HHJ Hampton either failed to read, or failed to understand, the general principle as stated at §17.181. It is much more likely that she read and understood it, but thought that the case fell within the exception set out at §17.183. That is not a case of ignoring the general principle, but of concluding that it was outweighed by the particular factors of the case.

79. As to (2) (Mr Sharma's expenditure on the property), HHJ Hampton referred in her judgment (at [15]) to Mr Sharma having taken considerable steps to refurbish the property and to the expense that he went to. She had extensive evidence on the point. It cannot be said that she was unaware of it, and it was obvious that refusal of relief would mean that Mr Sharma would lose the benefit of this expenditure. She evidently thought it was not a factor of sufficient weight to overcome the other factors.

80. As to (3) (delay) this does not add anything to the points which I have already considered above. Specifically, it is not the case (a) that any claim for relief is to be treated as having been made promptly if made within 6 months; nor (b) is this a case where HHJ Hampton proceeded on the basis that delay by itself would be sufficient to lead to the refusal of relief.

81. As to (4) (lack of prejudice to the Landlords), HHJ Hampton referred to the fact that the Landlords were individuals, who had acquired the property for its income and who were faced in January 2019 with the need to pay business rates. Being unaware, as she found, that the Tenants intended to apply for relief, they re-let the property. I think it is a fair reading of the judgment that she thought that they had acted reasonably, and not precipitately, in doing so. At [51] she referred to a submission for the Landlords that the reletting operated as a bar to the grant of relief; she evidently rejected that as at [102] she said that the fact that the premises had been re-let was one of the factors to be taken into account. It can be seen that that is consistent with the summary of the law in *Woodfall* at §17.183 to the effect that relief may be refused where the landlord has reasonably and not precipitately granted a new lease to a third party.

82. The authorities establish that where a landlord has reasonably re-let, relief may be refused if it would be inequitable either to the landlord or to the new lessee or both. Thus in *Stanhope* Lord Esher and Lindley LJ both referred to the landlord as having altered his position, and Lopes LJ to the landlord and other parties interested not being able to be put in the same position as before (paragraph 55 above); in *Gill* Jenkins LJ summarised the position as being that where parties had altered their position in the meantime, and in particular where the rights of third parties had intervened, relief ought not to be granted where the effect of it would be to defeat the new rights of third parties "or be unfair to the landlord having regard to the way in which he has altered his position" (paragraph 56 above); and in *Silverman* Slade LJ said that that the Court may, in the exercise of its discretion, properly refuse relief from forfeiture even to a tenant who belatedly tenders the full amount of outstanding rent and costs if, during the interim period, the landlord has, not unreasonably or precipitously, granted rights in the premises to third parties on the footing that the original lease is at an end, and the Court considers that, in all the circumstances, the grant of relief to the original tenants would cause injustice to the landlord or the third parties or both (paragraph 57 above). So too in *Bank of Ireland* Lightman J considered separately the question of relief as against the lessor and as against the new lessee (paragraph 59 above).

83. In the present case, HHJ Hampton did not refer to the position of the new lessee, and it was common ground before her that if relief were granted it should take the form of restoring the Tenants' lease in reversion on the new lease to Mr Jakhu. I have some doubt whether that would have eliminated any potential prejudice to Mr Jakhu: it may be that it would have made a practical difference to him whether his immediate landlords were the Landlords who had let the premises to him, or the Tenants who might wish actively to recover possession of them, not least because his lease was subject to a one month's break clause. But these matters did not form part of HHJ Hampton's reasoning and need not be considered further.

84. What she relied on was the position of the Landlords themselves. Mr Din submitted that they would suffer no prejudice by the grant of relief. I will assume that relief could have been granted on terms that reimbursed the Landlords for any payment of business rates (or indemnified them against any such liability), and compensated them for any costs incidental to the clearing of the property, preparing it for re-letting and the like: in fact Mr Din's skeleton for trial did not even offer payment of all the arrears of rent as he was at that stage contending that the Tenants should not be required to pay rent for any period when they had been kept out of possession. But even if relief could have been granted on terms that put the Landlords back into the same position as if the lease had never been forfeited, I do not see in the authorities any principle that requires relief to be granted if that can be done. Rather, as the citations above show, the principle appears to be that if the landlord has acted reasonably and not precipitately, and has altered his position in the meantime, it may be inequitable to grant relief. That seems to me to open the door to a general discretion to grant or refuse relief depending on a consideration of all the circumstances. That was what HHJ Hampton did and I do not think she can be faulted in doing so.

85. As to (5) (the arrangement between Mr Keshwala and Mr Sharma), I do not understand the point that is being made. HHJ Hampton was aware that the two Tenants had agreed between themselves that Mr Sharma would be responsible for Narborough Road. Indeed she relied on the fact that Mr Keshwala was reluctant to have anything to do with the property. I do not see in what respect it is said that she failed to take into account what she should have done.

86. As to the two matters that she is said to have wrongly taken into account (6) is the fact that the Landlords were unaware that the Tenants were actively progressing their intended application for relief. Mr Din said that this should have been left out of account as it was the Landlords who were avoiding communications and had made no attempt to contact the Tenants to find out their intentions.

87. I accept that there was evidence in the immediate aftermath of the forfeiture that the Landlords were avoiding communication: Mr Bhalsod got his solicitors to tell Mr Sharma to contact the agents, and at the same time disinstructed the agents; he did not respond to Mr Sharma's attempts to contact him by telephone; neither did he respond to Mr Mistry's approach. HHJ Hampton was well aware of and referred to all these matters, said (at [38]) that Mr Bhalsod's conduct was such as to attract the Court's disapproval, and at [78] that he made life difficult for the Tenants. But none of this explains why there was a complete failure by Mr Sharma to contact Mr Bhalsod or the Landlords in writing from 14 October 2018, when Mr Skipworth told him that AG were no longer instructed, to 25 January 2019, when Mr Patel attempted to copy

Mr Bhalsod into his e-mail.

88. Nor do I think that a landlord who has forfeited and has heard nothing from his tenant for over 3 months is obliged to contact the tenant to ask if he intends to apply for relief. Particularly is that so when Mr Sharma had not even responded to the Torts (Interference with Goods) Act notices, which one would have expected him to do if he wished to resume possession. There has in fact still been no explanation of why Mr Sharma did not ask his solicitors to send letters indicating his intention to apply for relief. Mr Din said that the explanation for the delay was, in part, the relationship between Mr Sharma and Mr Keshwala. But that, as HHJ Hampton said, did not explain why no holding letter was sent. It may be that Bond Adams LLP, who had received correspondence from Mr Keshwala's solicitors Crane and Walton LLP accusing them (with some apparent justification) of having brought the 2015 application for relief without instructions from Mr Keshwala, were reluctant to tell the Landlords that the Tenants intended to apply for relief until they were sure that they had secured Mr Keshwala's agreement; and it may be that Mr Keshwala took some persuading to join in the application which could have been of no benefit to him. But we do not in fact know what the explanation is; and the fact remains that no attempt was made to put the Landlords on notice that it was even hoped to bring an application. HHJ Hampton was in my judgment certainly entitled to take this into account.

89. As to (7) (the reluctance of Mr Keshwala) I again consider that it is impossible to say that this should have been ignored as irrelevant. HHJ Hampton was entitled to take the view that Mr Keshwala had at the very least shown himself reluctant to consent to the application for relief – and with good reason, as he had found himself recently being pursued for a large sum in respect of rates. When that is combined with the fact that she found that Mr Sharma was of doubtful financial standing, and Mr Keshwala had shown himself to be elusive, I think she was entitled to take it into account.

90. Mr Din in the course of his submissions set out all the factors that pointed in favour of granting the Tenants relief: the very small sum involved; the deliberate failure to tell Mr Sharma of the underpayment; the conduct of Mr Bhalsod in lying low, disinstructing the agents, and making it difficult for the Tenants to contact him; the conclusion of HHJ Hampton that the forfeiture was, although legal, harsh; the substantial sums spent by Mr Sharma on the property. He made an eloquent case. I think many judges might on those facts have granted relief. But as Mr Taylor reminded us, the question is not whether we prefer the way that Martin Spencer J exercised the discretion to the way HHJ Hampton did; far less is it how we would have exercised it ourselves. It is whether it can be shown that HHJ Hampton erred in principle. For the reasons I have given, in my judgment that is not made out.

91. I would therefore allow the appeal and restore the Order of HHJ Hampton.

Lord Justice Birss:

92. I agree.

Sir Christopher Floyd:

93. I also agree.