Neutral Citation Number: [2024] EWHC 2294 (Ch)

Case No: CH-2023-000151

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
APPEAL OF DECISION OF HHJ JOHNS KC OF 7 JULY 2023 IN THE CENTRAL LONDON COUNTY COURT, CASE REFERENCE K10CL217

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10th September 2024

Before :

Sir Anthony Mann, sitting as a judge of the High Court

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Between :

(1) LEICESTER SQUARE (2015) LIMITED **(2) SLOUGH SHOPPING CENTRE (2015) LIMITED** **(3) TRADERS SOURCE LIMITED** **(4) EU EXCHANGE LIMITED**	**Appellants**
- and -	
EMPIRE CINEMA 2 LIMITED	**Respondent**

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- -

Nicholas Trompeter KC (instructed by Ronald Fletcher Baker LLP) for the **First, Second and Fourth Appellants**
Jonathan Seitler KC and **Benjamin Faulkner** (instructed by Maples Teesdale) for the Respondent

Hearing date: 24th July 2024

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APPROVED JUDGMENT

This judgment was handed down remotely at 10 am on Tuesday 10th September by email circulation to the parties and release to the National Archives and other websites.

Sir Anthony Mann :

Introduction

1. This is the rolled up hearing of this appeal from an order and judgment of HHJ Johns KC, sitting in the County Court at Central London, and dated 7th July 2023. An order of Rajah J dated 23rd February 2024 provides for the hearing of the permission to appeal application and, if given, the hearing of the appeal, to be heard in a rolled-up hearing.

2. In his judgment HHJ Johns held that a re-entry by the first and second appellants ("the landlords") on to cinema premises in Leicester Square, London, purportedly pursuant to a right of re-entry in a lease, was unlawful because there was no occasion of forfeiture at the time of the re-entry. The tenant under the lease was the respondent ("the tenant" or "Empire"). The third and fourth appellants are two entities to whom the premises were licensed and/or leased immediately after the act of forfeiture, and were joined to the present proceedings as such after the proceedings were issued. However, in March 2024 the third appellant went into liquidation and did not play any part in this appeal thereafter. Nothing turns on that for the purposes of this appeal.

3. The short general background to this appeal is uncontroversial and can be taken from the judgment of HHJ Johns. Empire was/is (depending on the result of this appeal) the tenant of cinema premises under the remainder of a 99 year lease of which the first and second defendants were the landlords. The expiry date of the lease is 3rd November 2036. In 2020, at the onset of the covid pandemic, the rent was £5,000 per annum, plus an annual insurance rent. The premises were closed for the period 21st March 2020 to 18th July 2021 because of the pandemic. Empire did not pay the rent for that period, or the insurance rent. It is that failure which is said to justify the forfeiture which is at the centre of this case. In respect of that rent Empire claimed the benefit of a moratorium on enforcement procedures provided by statute, to which I will come, and one of the central points on this appeal is whether that moratorium period was in force at the date of the forfeiture.

4. Empire also claimed the benefit of a statutory arbitration procedure which was part of the covid legislation, and within that arbitration proposed that it should pay just half the rent and half the insurance rent which fell due during the closure period, with the other half being paid in 24 equal monthly instalments. The arbitrator rejected that attempt to abate the rents and determined that the whole of the rents should be paid. The landlords then purported to forfeit by physical re-entry within the period allowed for an appeal of the arbitration decision, during which the moratorium period was ostensibly running. If that period for an appeal was genuinely running in this case then the moratorium was still in place. That is the tenant's case. If it was not then the moratorium had fallen away and the landlords were entitled to forfeit. The judge below held that the period was still running so the moratorium was still in operation. That meant that the forfeiture was unlawful.

5. The circumstances surrounding the forfeiture itself were somewhat remarkable. The landlords re-entered via a fire door on the morning of 4th May 2023. By noon they had granted licences to occupy to the third and fourth appellants for initial fees and deposits of £180,000, and on the following day the third appellant was granted a formal lease. The new occupiers then set about carrying out fit out works at the premises, which were then used as a foreign exchange facility and a vape shop almost immediately. This was

during the weekend of the coronation of King Charles III. The desirability of trading during that weekend may explain the haste of these activities, as suggested by Mr Seitler KC, but that is of no relevance to this appeal.

6. In the afternoon of the day of the re-entry Empire paid the disputed arrears. An immediate application was made in the High Court by Empire against the landlords for an injunction (without notice) to be re-admitted to the premises, and that injunction was granted, but it was discharged and replaced with a more limited injunction. The action was transferred to the county court where in due course HHJ Johns KC heard a summary judgment application by Empire for a declaration that the forfeiture was unlawful, an application to which he acceded and from which decision this is the appeal.

7. In deciding against the landlords the judge below did so on the following bases, which are now disputed on this appeal:

   i) On the true construction of the relevant piece of coronavirus legislation (the Commercial Rent (Coronavirus) Act 2022 – "the 2022 Act") a moratorium was still in force at the date of the forfeiture.

   ii) The doctrine of illegality, invoked by the landlords, had no application to the facts of the case.

   iii) He rejected arguments based on estoppel, waiver and abandonment which were said to have brought forward the termination of the arbitration proceedings, which termination then brought about the end of the moratorium at a time prior to the acts of forfeiture.

   iv) He rejected the contention that there was "some other compelling reason" to proceed to trial (rather than allow summary judgment), that contention being based on an averment that because it was said there was going to be a forfeiture in due course in any event pursuant to proceedings then commenced but not yet served.

8. Each of those determinations is challenged on this appeal, and in addition the appellants aver that the action raises points of law which should not be determined on a summary judgment application. The appeal also raises a relatively minor costs point. The landlords appeared before me by Mr Nicholas Trompeter KC and Empire by Mr Jonathan Seitler KC and Mr Benjamin Faulkner.

The relevant legislation

9. The first relevant statue is the Coronavirus Act 2020 which came into force on 25th March 2020. Section 82 of that Act prevented the enforcement of any right of re-entry or forfeiture for non-payment of rent during the "relevant period". Pursuant to a later statutory extension, the relevant period expired on 25th March 2022.

10. Section 23 of the 2022 Act and Schedule 2 provide for the moratorium to which I have referred. Section 23 provides (so far as relevant):

"**23 Temporary moratorium on enforcement of protected rent debts**

(1) Schedule 2 contains—

> (a) provision preventing a landlord who is owed a protected rent debt from using the following remedies in relation to (or on the basis of) the debt during the moratorium period—
>
> (i) making a debt claim in civil proceedings;
>
> (ii) using the commercial rent arrears recovery power;
>
> (iii) enforcing a right of re-entry or forfeiture;
>
> (iv) using a tenant's deposit;
>
> (b) retrospective provision in relation to certain debt claims made by such a landlord before the start of the moratorium period for the protected rent debt;
>
> …
>
> (2) In this section "the moratorium period", in relation to a protected rent debt, is the period—
>
> (a) beginning with the day on which this Act is passed, and
>
> (b) ending—
>
> (i) where the matter of relief from payment of the protected rent debt is not referred to arbitration within the period of six months beginning with that day, with the last day of that period, or
>
> (ii) where that matter is referred to arbitration, with the day on which the arbitration concludes.
>
> ..
>
> (4) For the purposes of subsection (2)(b) an arbitration concludes when—
>
> (a) the arbitration proceedings are abandoned or withdrawn by the parties,
>
> (b) the time period for appealing expires without an appeal being brought, or
>
> (c) any appeal brought within that period is finally determined, abandoned or withdrawn."

11. Section 23(1)(iii) is the significant part of that subsection (the reference to the restriction of the right of re-entry) and subsection (2)(b)(ii) refers to the disputed end point relevant to this appeal – "the day on which the arbitration concludes". The

conclusion period is dealt with in subsection (4), and the tenant relies on paragraph (b), saying that the time for appealing was still running at the date of the re-entry.

12. Schedule 2 paragraph 5(2) contains the actual bar on enforcing rights of re-entry:

> "5 (1) The landlord may not, during the moratorium period for the protected debt, enforce, by action or otherwise, a right of re-entry or forfeiture for non-payment of the debt."

13. It is common ground that the unpaid rent in this case was a protected debt for the purposes of these provisions. The precise sum involved was £16,413.98.

14. The arbitration referred to in section 23 is one provided for in sections 1 and following of the 2022 Act. Section 1 provides that the Act:

> "enables the matter of relief from payment of protected rent debts from the tenant to the landlord under a business tenancy to be resolved by arbitration (if not resolved by agreement)."

15. Section 6 is more specific:

> "6(1) References to the matter of relief from payment of a protected rent debt are to all issues relating to the questions—
>
> (a) whether there is a protected rent debt of any amount, and
>
> (b) if so, whether the tenant should be given relief from payment of that debt and, if so, what relief."

16. Section 9 provides that a reference to arbitration may be made by either the tenant or the landlord within the period of six months beginning with the day on which the Act was passed (which was 24th March 2022). Section 11 provides for a reference to arbitration to include a "formal proposal" for resolving the matter of relief from payment. Section 13 provides for the sort of awards available to the arbitrator, and subsection (3) provides:

> "(3) If, after assessing the viability of the tenant's business, the arbitrator determines that (at the time of the assessment) the business—
>
> (a) is not viable, and
>
> (b) would not be viable even if the tenant were to be given relief from payment of any kind, the arbitrator must make an award dismissing the reference."

17. The arbitrator in this case took into account some Guidance issued pursuant to the Act which indicated various factors which the arbitrator should take into account in assessing viability and which expressly required that the arbitrator should "disregard the possibility of the tenant borrowing money or restructuring their business." This Guidance is expressly authorised by section 21 of the 2022 Act and the piece of guidance to which I have just referred reflects section 16(3) which expressly provides

for the arbitrator to disregard the possibility of restructuring in assessing the viability of the business of the tenant.

18. Mr Trompeter also cited to me various extracts from other governmental guidance and Codes of Practice issued before and shortly after the passing of the 2022 Act in which the government indicated that it was expected that tenants who could pay liabilities in full should do so. In April 2022 the Department for Business, Energy & Industrial Strategy published guidance to arbitrators. Mr Trompeter said that this stated that a party wishing to avail itself of the statutory arbitration scheme was expected to conduct itself in line with the behaviour and principles set out in a parallel Code of Practice issued at the same time – see paragraph 3.8. In fact it does not quite say that. It "recommends" that a party seeking arbitration should use a letter of notification as an offer of settlement "in line with the behaviours, principles and documentation set out in the [Guidance]". The significance of all this guidance is that it is part of Mr Trompeter's case that the conduct of Empire was a flagrant disregard of all this guidance.

19. The only other relevant piece of legislation is section section 70(3) of the Arbitration Act 1996 which requires any appeal from an arbitration to be brought within 28 days of the award. It is common ground that that applied in this case.

Summary judgment principles

20. The judge below followed the now oft-cited principles set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 39 (Ch):

> ""(i) The court must consider whether the claimant (or defendant) has a "realistic" as opposed to a "fanciful" prospect of success.
>
> (ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
>
> (iii) In reaching its conclusion the court must not conduct a "mini-trial".
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in its statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application, but also the evidence that can reasonably be expected to be available at trial.
>
> (vi) Although a trial may turn out not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so effect the outcome of the case.
>
> (vii) On the other hand, it is not uncommon for an application under CPR 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

21. Mr Trompter obviously did not challenge the applicability of those principles.

22. The judge also noted what was said in *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Telephone Ltd* [2011] UKPC 7:

> "The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts"

23. Mr Trompeter stressed those matters and complained that the judge did not apply them properly. He also submitted that where a summary judgment application involved a "prolonged and serious argument" the court should generally decline to proceed with it – *Williams and Hubert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368. I agree that that may be a valuable guideline but a judgment has to be made as to what is, in the circumstances, "prolonged and serious argument". Some "prolonged and serious arguments" turn out to be smokescreens designed to draw out proceedings, and the court must be alive to that possibility. The present case took just a day to argue below, and while I am sure the argument was "serious" that does not immediately smack of a "prolonged" hearing within the cautionary principles in the case just cited. The judge obviously took the view that the nature of the case was such that it was appropriate to allow an application for summary judgment in terms of the scope of the arguments involved, and that matter of judgment is not one which an appellate court will interfere with save on the usual principles governing appeals from matters of judgment, with the additional cautionary element applying to case management decisions because a decision on a point of this nature has case management elements.

24. I will therefore approach this matter with those principles in mind.

The chronology in more detail

25. It is now necessary to turn to more details of the chronology, because a large part of Mr Trompeter's case turns on that detail. The primary facts of the chronology appearing below are not controversial; some of the inferences to be drawn are.

26. The first rent unpaid by Empire was the rent due in the June 2020 quarter. Mr Trompeter submitted that it is to be inferred that the decision not to pay the rent will have been made at the highest executive level. The insurance rent payable for the year to 23rd June 2021 was not paid either. Empire started paying rent again from 18th July 2021. The "protected rent" which is the subject of these proceedings was the only rent left outstanding. The 2020 Act's bar on enforcement by re-entry came into force on 25th March 2020.

27. On 24th March 2022 the 2022 Act came into force as did its moratorium period, lasting for 6 months or, if an arbitration was commenced in that period, until the final determination of the arbitration – see above.

28. The group of which Empire formed part had been maintaining that the terms of its leases, or some of them, did not oblige them to pay rent for periods, such as the pandemic, during which they could not use their leased premises. That litigation came to an end with a Court of Appeal decision on 27th July 2022 which ruled against that argument – *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2022] EWCA Civ 2021.

29. On 7th September 2022 Empire, along with other companies in the Criterion group, entered into a Chapter 11 procedure in the United States, generating a moratorium in relation to pre-Chapter 11 debts. However, post-Chapter 11 rents were resumed, and the rents payable on the September 2022, December 2022 and March 2023 quarter days were paid. The payment of these rents gives rise to a potential waiver point in relation to the protected rent debt in issue in these proceedings, as appears below.

30. On 13th September 2022 Empire made a referral to arbitration under the 2022 Act. At this point in time the general moratorium under the Act was still in operation, so the effect of this referral was to extend the moratorium to the conclusion of arbitration process pursuant to section 23(2)(b)(ii) – see above. I put the matter in that slightly generalised way because precisely how this end date works is the principal question on this appeal. Absent the reference to arbitration the moratorium would otherwise have come to an end on 24th September 2022.

31. On 23rd April 2023 the Arbitrator delivered his award. In it the arbitrator observed and found the following (so far as relevant to this appeal):

    i) The landlords referred to the Chapter 11 proceedings as being a reason why the arbitration should be dismissed. He observed that neither party adduced legal opinion as to the effect of those proceedings. In paragraph 73 he recorded that he had been provided with details of the US restructuring plans but said that he must disregard this factor. This was correct - see section 16(3)(b).

    ii) At paragraph 67 he correctly recorded that the Act provided that he was obliged to dismiss the reference if at the time of the assessment the tenant's business was not viable and would not be viable even if the tenant were to be given relief from the payment of the protected rent.

    iii) At paragraph 76 he recorded that even if he were to grant the relief sought for the protected rent debt the business of Empire would still not be viable.

    iv) He therefore dismissed the reference as required under section 13(3) of the 2022 Act.

32. It is the case of the appellants that the moratorium ended on that date, for reasons to which I will come.

33. On 2nd May 2023 Empire filed a motion in the Chapter 11 proceedings asking for the permission of the court (in accordance with the statutory regime) to pay the outstanding rent as part of the process of "assuming" the lease. The motion indicated that Empire proposed to pay the relevant amount (paragraph 12).

34. On 4th May 2023 the landlords re-entered the premises and granted new interests, as appearing above. On the same day at about 2.30pm Empire paid the outstanding rent.

35. 21st May 2023 is the date which is 28 days after the decision of the arbitrator and on which, according to Empire, the moratorium came to an end because by then there had been no appeal – see section 24(3)(b)- the expiry of "the time period for appealing expires without an appeal being brought".

The decision below

36. In the court below the judge found the following in the course of finding in favour of Empire:

    i) He rejected an argument that the Guidance Codes had the effect that an "appeal" in section 23(4)(b) meant only a genuine appeal or that the moratorium period did not apply during a period where a tenant had already decided against an

appeal, considering that this was the sort of construction point which it was proper to decide on a summary judgment application (paragraph 37). He did not make any finding on the high factual case made by the landlords that the failure to pay rent was a "cynical" decision by a tenant who could have paid the rent, taken at a high internal level, to adopt a course of conduct which was contrary to the Codes because its motivation was simply to transfer the commercial risks of the pandemic to the landlords and away from the tenant. The submission to the judge below was that there were no genuine grounds for appealing and the tenant had no intention to appeal. It would seem that the reason that he did not make any determination about that was because he held it made no difference to the point of statutory construction with which he was faced. He decided that as a matter of construction the meaning of "appeal" propounded by the landlords was not correct. He came to this decision having regard to what he considered to be the purpose of the Act, the fact that the landlords' construction was in no way reflected in the wording of the Act, by analogy with the provisions of section 64 of the Landlord and Tenant Act 1954 and because of the uncertainty that would flow from the landlords' construction.

ii) He rejected the landlords' case that the principles of illegality prevented Empire from asserting its claim of unlawful forfeiture.

iii) He rejected arguments to the effect that certain acts of Empire waived its right to an arbitration, estopped Empire from claiming that the moratorium was in force and/or indicated an abandonment of the right to appeal.

37. The landlords challenge all those findings in this appeal.

Ground 3 of the appeal – the appropriateness of a summary judgment application in this case

38. It will be convenient to take this Ground first, even though it depends on the manner of determination of the other Grounds. It is an averment that the arguments before the judge were not appropriately determined in a summary judgment application because they were prolonged and serious arguments which were inappropriate for such a determination.

39. I reject this Ground. The point of statutory construction which the judge decided did not depend on an elaborate argument. The whole of the argument on the application was completed in a day. It was, as he said, a short point, and it fell well within the sort of consideration of points which the above principles of summary judgment applications permit. His decision to entertain it was well within the ambit of judicial discretion on the point and should not be interfered with it. Furthermore, for what it is worth, I agree with that assessment of the appropriateness of entertaining it. Had he agreed with the landlords' construction then there would have been a factual dispute as to whether Empire's motivation was one which impermissibly subverted the purpose of the legislation, and the Guidance issued by the government, and that would have required a trial; but his interpretation of the statute made that unnecessary.

40. Likewise the other matters which he decided were, in their scope, well within what it is appropriate to decide on a summary judgment application.

41. I reject this Ground of appeal.

Ground 1 – the finding about the extent of the moratorium

42. This is the Ground which, in reality, lies at the heart of this appeal. The landlords submit that, as pleaded, the intention of Empire behind ceasing to pay the protected rent payments was a cynical act of burden-shifting which was contrary to the purpose of the legislation and the issued guidance. Empire knew it had no prospect of avoiding payment, and it could have made the payments had it wished to do so. Its Chapter 11 proceedings did not prevent the payment being made, as was demonstrated by the fact that when payment was made it was made before the US court had decided on the motion to permit it. It never genuinely intended to appeal the determination of the arbitrator.

43. In support of its averment that the attitude of Empire was contrary to the guidance Mr Trompeter referred me to various parts of the various versions of the Guidance which he said demonstrated that the expectation and guidance of the government was that debtors who could pay should pay. The purpose of the legislation was said to be to protect those who could pay at least in part if given some accommodation so that those businesses could emerge from the pandemic as trading entities when they would otherwise have to close down because of an unmitigated rent burden.

44. According to Mr Trompeter, that purpose informed the true construction of the references to "appeal" in the legislation so that it meant only genuine and viable appeals. Since Empire never had a genuine intention to appeal, and since there was actually no viable appeal, then the extension of the moratorium beyond the determination of the arbitrator into the period of an appeal did not apply notwithstanding the provisions of section 23(4) of the 2022 Act. The references to appeals did not include "appeals" which were none viable and not intended.

45. In support of this submission Mr Tromptpeter relied on various authorities which he said applied a purposive construction of statutes to extend the meaning of statutory expressions beyond that which disputed words might otherwise be thought to bear. He pointed to the approach in *WT Ramsay v IRC* [1982] AC 300 and the examples of *Cadogan v Morris* (1999) 31 HLR 732 and *Rossendale BC v Hurstwood Properties* [2022] AC 690.

46. In *Cadogan v Morris* the Court of Appeal held that a tenant's notice under the Leasehold Reform, Housing and Urban Development Act 1993, which required the notice to "specify the premium which the tenant proposes to pay in respect of the grant of a new lease", was ineffective. The tenant had proposed a "formal nominal figure" of £100 which bore no relation to a realistic figure which was probably between £100,000 and £300,000. Stuart-Smith LJ held that the notice was invalid because the tenant was required to specify a premium which he proposed to pay but he did not do so; he deliberately proposed a figure which he did not propose to pay. An offer in the notice had to be realistic and not nominal - see paragraph 17.

47. I do not consider that this case assists Mr Trompeter. First, it is a case about a specific provision in a specific Act. It does not necessarily translate easily into other provisions in other Acts. Second, it concerned whether a positive act, which did actually taken place (the service of a notice with given content) fulfilled a statutory requirement.

There is no parallel in the present case which involves an assessment of the content and bona fides of an act (the appeal) which had not yet taken place. It shows no more than that in certain statutory contexts the genuineness of a positive act can be assessed.

48. *Rossendale* was relied on as being another case where the court (the Supreme Court in that case) adopted a purposive interpretation of a statute to bring a situation within the meaning of "entitled to possession" which was beyond the normal meaning of those words. In that case the expression was held to extend to a situation in which the landlord under a lease to an SPV, which was specifically intended to avoid liability for rates, was still entitled to possession under the wording of the relevant legislation which used the expression. This case does not necessarily assist Mr Trompeter either. It does illustrate the court having regard to the purpose of the legislation (a principle which does not require *Rossendale* to establish it), but it is again a case on its own special facts. The analysis in that case must be approached with some care. Although the Court had to interpret the wording of the legislation it determined that, on the special facts of that case, the reality of the transaction was that the landlord had not parted with possession, and so remained "entitled to possession" within the meaning of the Act – see paragraph 50.

49. Having said all that, and as I have indicated, there was no controversy over the availability of the principle of purposive interpretation. There was, however, a dispute about what the purpose should be taken to be for these purposes. Mr Trompeter's purpose was an extensive one, reflected in the judgment at paragraph 33 and in his skeleton argument in similar terms. I take the latter for these purposes:

> "In the present case, in the context of the Codes of Practice and Guidance set out above, the purpose of the Act is clear enough. As was submitted before the Judge, the Act was designed to provide relief from payment of certain rent debts to particular categories of tenants affected by the COVID-19 pandemic who genuinely needed such relief in order to support an otherwise viable business. The purpose of the Act was most certainly not to support tenants (i) who did not need such relief (but simply chose to withhold payment of rent) or (ii) whose business were unviable (regardless whether or not relief was given). On the contrary, the letter and the spirit of the Codes of Practice, the Guidance and the Act itself make plain that such tenants were not intended to have the benefit of the Act at all. In the case of category (i), it was intended that those tenants should pay rent in full to their landlords, without any delay. As for category (ii), those tenants were not expected to receive any relief from payment whatsoever, but instead to enter into some sort of insolvency process as a function of their lack of viability as a business."

50. As Mr Seitler pointed out, what one should be looking for is not so much the purpose of the Act, but the purpose of the provisions which are under consideration. An Act may have many purposes (and in fact is likely to do so). It may well have one overall general purpose, with discrete parts, and sections within parts, having more closely defined purposes relevant to their wording and context. The focus should really be on

the purpose of the provision in question, albeit in the context perhaps of the more overall purpose.

51. Again as Mr Seitler pointed out, when courts have considered the purpose of an Act (or provision) it is generally at a higher generality than the detailed and targeted analysis of Mr Trompeter. The judge, rightly in my view, preferred a more generalised purpose of the Act in his paragraph 38:

> "A better candidate, for the purpose of the Act, is some distillation of what is to be found in the ministerial forward to the 9 November 2021 code of practice which referred to the then Commercial Rent (Coronavirus) Bill.
>
> > "The evidence collected clearly shows that in a minority of cases, some landlords and tenants have been unable to resolve their disputes over rent arrears. Our Commercial Rent (Coronavirus) Bill will help bring these cases to a swift resolution. The Bill allows for the ringfencing of debt built up by businesses who have been forced to close during the pandemic. It establishes a binding arbitration system which will then decide what happens to that ringfenced debt."

52. I agree that if one is looking for an overall purpose of the provisions relevant to this case that is a useful encapsulation. If one adopts it for the moment then it goes nowhere near displacing the normal meaning and effect of the references in section 23 to an appeal. The Act achieves its purpose by providing an arbitration mechanism and a moratorium linked to that mechanism. That mechanism is quite clear and it achieves the purpose. This does not facilitate Mr Trompeter's case.

53. However, it seems to me that even if one adopts Mr Trompeter's formulation of the purpose it does not assist the landlords in establishing that an appeal somehow has to be a "genuine" one, especially in the light of the uncertainties and vagaries to which the landlords' interpretation gives rise. One can effect that purpose by putting an arbitration system in place for deciding into which category tenants fall, which is what the Act did. There will be disputes as to whether a tenant is intended to have the protection of the Act and it is the arbitrator who decides those disputes. They do not have to be decided by some criterion of assessment as to whether a tenant even has an argument as to what should happen to it so that a tenant who has no case for relief at all does not even have a right to a moratorium, or (as the appellant maintains) an appeal.

54. That brings one to the uncertainties that would prevail if the landlords' argument were correct, and to inconsistencies to which the judge himself adverted. If the tenant were somehow correct in saying that a tenant with lots of money, or no money, was not to be protected by the Act, then presumably it ought to follow that such a tenant does not even have a right to the moratorium; but that is not provided for by the Act. Nor should a tenant have a right to apply for an arbitration itself, with its extended moratorium; but that is not provided for either, and Mr Trompeter did not propose any interpretation of any part of the Act which would achieve that.

55. In fact, the landlords' position in this particular case required a non-worthy tenant such as he says Empire is <u>should</u> have the benefit of an arbitration and the accompanying

extended moratorium. In order to succeed the landlords need the first state of the moratorium. That is because on the facts of this particular case the landlords would be vulnerable to a waiver of forfeiture defence if they did not have the moratorium on payment associated with the arbitration itself. They need the disputed rent to be "protected rent" during this the moratorium as extended by the arbitration to avoid the consequences of a waiver. As pointed out above, the landlords accepted 3 quarters of rent from September 2021. That receipt would be capable of amounting to a waiver of forfeiture in relation to the non-payment of the protected rent in this case unless the commencement of the arbitration proceedings extended the moratorium. Mr Trompeter accepted this analysis. So to avoid that consequence Mr Trompeter needs to be able to rely on the moratorium extended by his arbitration proceedings, and he did so.

56. That means that the Mr Trompeter had to tread what the judge below described as a "narrow path" in his paragraph 49, and he adverted to its impossibility in this context in his paragraph:

> "38. First, even if the purpose of the Act is as the Landlords describe, it seems to me impossible to say *both* that that purpose is *not* defeated by a non-genuine reference to arbitration (so that the moratorium period continues during the arbitration, as it must, for the Landlords to succeed on their case overall) and that that purpose *is* defeated by allowing the moratorium to continue for the short period of 20 days beyond the making of the award." (HHJ Johns' emphasis).

57. I agree with him. There is an inherent illogicality in the landlords' analysis. When I put this to Mr Trompeter he effectively had no answer to it other than a vain attempt to distinguish between administrative and substantive steps, which fails (see below).

58. There is also an inevitable problem of uncertainty. The existence or otherwise of the moratorium is an important matter for the parties. They need to know where they stand and it needs to be clear whether the moratorium exists or not. On the face of the statute, and on Empire's interpretation, the position is clear. If an arbitration is commenced the moratorium continues beyond the statutory cut-off date. After that date the moratorium continues to another cut-off date (28 days after the award) unless there is an appeal, in which case the final conclusion of the appeal becomes the final cut-off date. All that is clear, workable and intelligible, which is important when enabling the parties to ascertain their proprietary rights.

59. The landlords' interpretation has none of those qualities. The existence of the moratorium depends on the legal quality of the appeal's chances, as to which views may differ, and, to a degree, on the subjective intention of the tenant. If the appeal looks very difficult and the tenant decides not to appeal, but to carry on and take advantage of what it perceives to be the moratorium, then on the landlords' analysis the moratorium has come to an end, unbeknown to the landlords, because it is no longer serving the apparent statutory purpose. Again, how does one divide the apparently plain case of a hopeless appeal where a tenant's business is not viable from a borderline case where one might take either view (a very real possibility where what is in issue is commercial viability). It cannot be sensible to allow an important matter like the moratorium to be governed by such uncertain factors when the mechanical test apparently provided by the statute provides complete certainty and makes sense.

60. Mr Trompeter pointed to what the Supreme Court said about what he said was an analogous point in *Rossendale*:

> "61. … We would, however, reject the criticism that the test is insufficiently certain. In any ordinary case the test will easily be satisfied by identifying the person who is entitled to possession as a matter of the law of real property. The fact that the law of real property may not prove a reliable guide in an unusual case of the present kind is not in our view an objection to our preferred interpretation. The value of legal certainty does not extend to construing legislation in a way which will guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation seeks to impose."

61. That is an approach which works in the type of case with which the Supreme Court was concerned, where it was dealing with the effects of a particular positive act which could be measured against statutory criteria. That does not have an equivalent in the present case. The same applies to what was said in *Cadogan* at paragraph 17, which was also relied on by Mr Trompeter in this context.

62. I also consider that the judge below was justified in relying by analogy on section 64 of the Landlord and Tenant Act 1954. This provision, like the provisions under consideration in this appeal, provides for a right to come to an end on the final disposition of an appeal – under this Act the rights are a statutory continuation of tenancy. The section provides:

> "64. **Interim continuation of tenancies pending determination by court.**
>
> (1) In any case where—
>
> (a) a notice to terminate a tenancy has been given under Part I or Part II of this Act or a request for a new tenancy has been made under Part II thereof, and
>
> (b) an application to the court has been made under the said Part I or the said Part II, as the case may be, and
>
> (c) apart from this section the effect of the notice or request would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of,
>
> the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time.

> (2) The reference in paragraph (c) of subsection (1) of this section to the date on which an application is finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired, except that if the application is withdrawn or any appeal is abandoned the reference shall be construed as a reference to the date of the withdrawal or abandonment."

63. This provides a mechanical, not a subjective, test, and the judge recorded that counsel was not aware of it ever being suggested that the statutory continuation provided by section 64 could be nullified where no genuine appeal was possible or no appeal was intended. That is not surprising, because such a test would give rise to similar unnecessary and undesirable consequences as those just addressed in relation to the existence and termination of proprietary rights. Parliament cannot be taken to have intended such consequences, and the statute simply means what it says.

64. It may be that Danckwerts J had such an effect in mind in *Re 20 Exchange St, Manchester* [1956] 1 WLR 765 when he refused to abridge time for appealing under the Act. He did not consider that he had jurisdiction to do so, but went on:

> "I would like to add that, if I had any such power … I doubt whether I should exercise it in a case of this kind. The possible hardships to which counsel for the landlord has referred seem to me to be hardships created by the Landlord and Tenant Act 1954, and by matters with which I ought not to interfere, since the legislature has thought fit to provide for certain consequences in cases of this kind."

65. The hardships to which he referred would seem to be delays in getting possession (see the argument at p767), and what Danckwerts J was apparently doing was acknowledging that they were a consequence of Parliament's chosen mechanism. The same applies in the present matter.

66. I therefore consider that on this point the judge below was entirely correct, and for reasons which are largely the same as his. The point is a clear, short one and eminently suitable for determination on a summary judgment application. It arises more from the ingenuity of counsel than from any difficult questions arising out of statutory drafting.

Ground 1(b) - Illegality

67. Next is an illegality point taken by Mr Trompeter. It arises out of paragraph 11 of the landlords' pleaded Defence, which was quoted by the judge below:

> "In the premises, in making the Proposal in the circumstances set out above the Claimant was seeking to deceive the First and Second Defendants and/or the CIArb and/or to procure an arbitration award by fraud and/or was otherwise intent on misusing and/or abusing and/or subverting the codes of practice, the guidance, the Act and the aims which underpinned it".

And he then recorded a submission that it would be harmful to the integrity of the legal system to allow Empire's claim that the forfeiture was unlawful.

68. In considering this point the judge correctly identified and set out the recent formulation of the requirements for an illegality defence set out by Lord Toulson in *Patel v Mirza* [2017] AC 540:

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary
>
> a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,
>
> b) to consider any other relevant public policy on which the denial of the claim may have an impact and
>
> c) to consider whether de nial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.
>
> Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate." (I have divided up the three elements into separate paragraphs for clarity of exposition in this judgment. In the original they are all within the same paragraph.)

69. However, before turning to that test the judge seemed first to reject the submission about integrity in terms which found in essence the opposite to the tenant's claim damaging integrity, namely that it was allowing the <u>landlords</u>' case that would damage that integrity because of the inconsistency already recorded of proceeding on the footing that the arbitration was valid but the appeal not. He said:

> "48. As I have sought to make clear, the Landlords' case overall relies equally, and necessarily, on the arbitration. The argument on illegality therefore involves accepting that there was a moratorium for the period of the arbitration, but asserting, nevertheless, that it would be harmful to the integrity of the legal system for Empire to be able to say that the moratorium expired as provided by section 23(4)(b), namely when the time for appealing expired.
>
> 49. That attempt to walk the narrow path seems to me bound to fail. How can reliance on the arbitration and accompanying moratorium not be harmful to the

> integrity of the legal system, but reliance on the last few weeks moratorium is? In my judgment, what would do little credit to the legal system would be to allow the Landlords to take the benefit of the moratorium in the Act up to 23 April 2023 and then permit them to ignore it for the purposes of changing the locks, installing the New Occupiers, and refusing to return the tenant to possession, even though the Arrears are paid that same day."

70. In saying this the judge was presumably addressing the opening words of the citation from *Patel.* At paragraph 51 he rejected an argument which sought to distinguish the notice referring the matter to arbitration (said to be a mere administrative step) and an appeal (a substantive step). The judge regarded both of them as substantive.

71. Mr Trompeter sought to criticise this reasoning on the footing that it focused on what the defendants were said to be doing, whereas illegality requires an investigation of the conduct of the claimant. I do not really understand how this point works for him. The plea in the Defence is that the claimant indulged in fraud and an abuse of the arbitral process, which are acts of the claimant. The judge held that those arguments did not suffice because of the landlords' inconsistency of approach in treating the arbitration as valid and the appeal as not. That does not remove the focus from the acts of the claimant.

72. I consider that the judge was entirely correct in his assessment about the integrity of the legal system. Whether or not the underlying alleged conduct of Empire could otherwise fall within the scope of an illegality defence, the sort of selective dissecting approach to it which the landlords' case involved cannot be a correct invocation of the illegality principle. It makes no logical sense and is entirely unmeritorious. In *Grondona v Stoffel & Co* [2021] AC 540 at paragraph 26 Lord Lloyd-Jones, commenting and applying *Patel*, said:

> "The essential question is whether to allow the claim would damage the integrity of the legal system."

73. Although that was said in the context of summarising the effect of the first two factors in the citation from *Patel*, that consideration is capable of justifying, and does justify, the judge's view of the matter and its relevance. It would be contrary to a coherent legal system to allow the landlords to adopt their selective view of the effect of the arbitration and moratorium periods, and there is absolutely nothing in public policy which would justify it. Incoherent contradictions are to be avoided – see again Lord Lloyd-Jones in *Grondona* at para 26:

> "It is important to bear in mind when applying the 'trio of necessary considerations' described by Lord Toulson JSC in *Patel* … that they are relevant not because it may be considered desirable that a given policy should be promoted but because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions."

While again it has to be acknowledged that the context of this remark was slightly different, the same need for coherence should be applied to factors which affect the running of the illegality defence. It would not be a coherent approach to allow the landlords to tread the narrow path which they have sought to tread.

74. Mr Trompeter sought to tread the narrow path by challenging the judge's rejection of his case that the referral to arbitration was but an administrative step, in contrast to the appeal which was a substantive step. He sought to rationalise this by submitting that the "referral" to arbitration does not commence the arbitration; it was only commenced when the arbitrator was appointed by the arbitration body. The referral was therefore not a substantive step, whereas an appeal was. Like the judge I have little difficulty in rejecting this way of rationalising the inconsistency in the landlords' approach. The referral is a necessary step to towards the arbitration, and there is no rational basis for somehow downgrading it for these purposes. The two steps were equally substantive for these purposes.

75. The judge below then considered the threefold test in *Mirza v Patel* and held that the illegality argument failed at all three levels in brief terms:

> "50. In terms of the three-part test identified by the Supreme Court in *Patel*, and which is equally applicable in property cases (see *Grondona v Stoffel* [2020] UKSC 42), (1) any relevant prohibition would not be enhanced by taking that course, (2) denial of the claim would promote precipitate physical re-entry by landlords in cases of protected rent debts (a remedy famously described as "dubious and dangerous" by Lord Templeman in *Billson v Residential Apartments* [1992] 1 AC 494 at 536C), and (3) denial of the claim would be a disproportionate response involving the loss of 13 years of a valuable lease of cinema premises in Leicester Square, subject only to arguments about relief against forfeiture. The Landlords cannot, of course, assert any illegality in relation to an appeal, because there was none."

76. Mr Trompeter said the judge's reasoning was wrong in relation to each limb. In relation to the first, he suggested that the judge's point made about the inconsistency of approach was the reason for the judge's first conclusion, and pointed out that he otherwise gave no reasons for it.

77. It is true that the judge did not elaborate on his shortly stated conclusion under the first limb, but I do not consider that his remark about inconsistency was a reason. His remark about inconsistency, which seems to me to be entirely justifiable, seems to have been a standalone point. Mr Trompeter's criticism of it is unjustified, for the reasons just given.

78. So far as the absence of other reasons is concerned, it is true that the judge did not give reasons for his shortly stated conclusion under limb (1), but in my view the overall conclusion is justified. It is plain that the judge could not identify a relevant "prohibition" because he did not identify one. I, too, cannot find any any clear "prohibition" which might require the additional protection of an illegality defence, let alone one that would be enhanced. The statute does not contain any such thing. The separate guidance reflects criteria for the determination of disputes, but there is nothing relevant in the nature of a prohibition. Furthermore, the effect of allowing the illegality defence in circumstances such as those pleaded in the present case would not materially enhance the effect of the legislation. The legislation specifically provides for benefits and a mechanism for determining whether they should be enjoyed. There is no need for an additional illegality defence in actions brought by the tenant to enforce what it perceives to be its rights. The rights of the tenant will have been determined by the legislation and, if necessary, the arbitration.

79. The countervailing policy under head (2) was identified by the judge as disincentivising landlords from seeking physical re-entry (if I may be allowed to re-cast his logic). He held that to deny the claim would promote the desirable aim of preventing landlords taking possession matters into their own hands by physically re-taking possession.

80. I consider that this would seem to require a little unpacking. The right of physical re-entry is a right which landlords have, and while the courts might sometimes find it distasteful it is nonetheless acknowledged where it takes effect lawfully. Such restraints as there are have been introduced by statute. Where they have not been introduced a landlord is entitled to the right.

81. I do not consider that this reflects a policy of disincentivising physical re-entry, defined in those terms, which the court should be promoting as such, at least not in this context. Nor do I consider it likely that the judge really meant to identify a policy which stood against this right. I consider that what he was really referring to was the disorder that would result if illegality could mean that a tenant were to be held to be disentitled to the moratorium because of its abusive intentions in appealing (or, come to that, starting an arbitration in the first place, though that is not said in the present case.). Statute has laid down some clear steps for suspending rights that would otherwise exist, and it is in the interests of clarity of property rights that those somewhat mechanical steps should be seen to have their stated effect merely by virtue of their having been carried out or the relevant circumstances arising. Otherwise there would be an undesirable effect of uncertainty in property rights. Debates about motivation would be played out in the context of landlords taking matters into their own hands and arguing that the tenant had no rights to a moratorium which statute prima facie provides it should have. The countervailing policy of procuring certainty of property rights as provided for by statutory mechanisms would weigh against any perceived undesirability of allowing tenants to commence "fraudulent" appeals merely to extend the moratorium. This consideration is capable of standing behind the judge's briefer formulation and in my view does so.

82. Taking factors (1) and (2) from *Patel* together, as I am enjoined to do by Lord Lloyd-Jones in his paragraph 26, I come to the conclusion that there are no policy considerations which justify the defence in this case, and there are policy considerations which stand in its way, so there is no need to consider head 3 (see Lord Lloyd-Jones in the paragraph just referred to). Had I had to consider that third head I would have found some difficulty in supporting the judge's conclusion on proportionality, but as it is I do not need to consider it.

83. For the sake of completeness I would add that Mr Trompeter identified holding parties to their commercial bargains as being a policy whose promotion would be better served by allowing the illegality defence. That might be described as a public policy but it would be neither advanced nor harmed by allowing the illegality defence. It really has nothing to do or to say where Parliament has created statutory rights, defences and an arbitral mechanism which plainly impinge on the effects of a contract.

84. I therefore consider that the judge below was correct to dismiss the illegality defence.

Ground 1(c) – waiver, estoppel and abandonment

85. Like the judge I can take these matters together because they arise (or are said to arise) out of the same cluster of facts. They arise out of a pleading to the effect that that because of the matters relied on "the Claimant is now estopped or otherwise prevented by waiver from asserting that the moratorium period had not concluded prior to 4 May 2023."

86. The judge below dealt with two matters said to have given rise to estoppel or waiver. The first was a statement made in the arbitration documents to the effect that Empire intended to comply with the arbitral award, and the second was the motion made in the US Chapter 11 proceedings, dated 2nd May 2023, in which Empire acknowledged it was required to pay the arrears and had obtained the lender's consent to do so.

87. In paragraph 54 Judge Johns dismissed both arguments, holding that there was no conduct after the award unequivocally accepting it (distinguishing *A A Amram Ltd v Bremar Company Ltd* [1966] 1 Lloyds Rep 494), that the motion spelled out that it was not an acceptance of liability and that those matters were in any event not communicated to the landlords. The indication in the arbitration could not be regarded as a promise not to bring an appeal, in its context. He went on to find that if there were a waiver it would simply bar an appeal and would not accelerate the time for the expiry of the moratorium. He therefore held that the waiver/estoppel/abandonment arguments had no prospects of success.

88. I consider that the judge was right in his findings under this head, for the reasons appearing below.

89. Mr Seitler pointed out that the claim arising out of the arbitration documents was not pleaded. However, since the judge below dealt with it I shall do the same. What is relied on by the landlords is a paragraph in the tenant's responsive submissions in the arbitration which said (quoting in full):

> "3.10. This is untrue. We have every intention of complying with your award."

90. As is apparent from that quotation, that was a response to something that was said in the landlords' submissions:

> "3.10 Based on the above the Defendant in this application firmly believes that the Applicant has no intention of honouring any Award made by you, the Arbitrator, but has merely made this Application to delay the obligation to pay the subject Protected Rent and to protected [sic] itself from the Landlord's rights to secure debt recovery."

91. The judge found that the tenant's statement could not amount to a promise not to bring an appeal, and I agree. It is a riposte to a challenge that the arbitration would be ignored, and no more. It is simply not possible to take it any wider than that, and certainly not possible to treat it as an indication that there would be no appeal. One can test this simply by imagining an award that contained a serious appealable error. Empire cannot be taken to be waiving an appeal in relation to that. The words simply cannot bear the weight, or carry the burden, which the landlords would have them bear. That is what the judge found, and he was correct in doing so. That is an end of that point. In his skeleton argument Mr Trompeter relied on the fact that Empire did not indicate a change

in stance after the award was published. That does not improve his position because no relevant promise or indication was given in the first place.

92. Reliance on the US motion fails on a fundamental factual point. Mr Trompeter accepted that acts of waiver had to be communicated for a waiver to be operative. He also accepted that the landlords were not aware of the US motion at or by the time of the re-entry. Indeed, that was positively averred in the evidence of Mr Aziz for the landlords. So there was no communicated this act relied on as a waiver. That is an end of the waiver argument. An estoppel argument fails for the same reason, and because of the absence of any reliance. Both waiver and estoppel also have the difficulty of contending with a very wide non-admission non-waiver reservation of rights paragraph in the motion document itself (apparently adverted to by the judge in general terms), but I do not need to go into that.

93. No submissions were made on abandonment.

94. I also consider that the judge was right in his conclusion that a waiver or estoppel would do no more than bar an appeal, if it were successful. It would not bring the moratorium to an end, because the moratorium is not created by an appeal; it is merely terminated once the time for appealing has passed. However, there was no substantive argument on this point and I need not consider it in any further detail.

95. It follows that this ground of appeal fails.

Ground 2 – some other compelling reason for the issue to proceed to trial

96. This ground is based on the premise that the lease in question is to be forfeit in any event. As at the date of the summary judgment hearing the landlords had served a section 146 notice claiming that the lease should be forfeit because there had been a composition or arrangement with creditors, namely the US Chapter 11 proceedings. A claim form claiming possession on the basis of such a forfeiture had been issued but not yet served. The argument before the judge, as recorded by him, was that, at least on service of those new proceedings in due course, there was a real prospect of showing that Empire did not have a right to possession as the lease would then be forfeit. This section of his judgment seems to indicate that this was a point taken by the new occupiers who were admitted immediately on the re-entry, who accepted that (on the basis of the judge's findings thus far) a declaration should be made that the lease was not forfeit, but they resisted the order for possession (paragraph 58).

97. The judge dismissed that argument. He found that a landlord who was claiming to forfeit through legal proceedings was not entitled to possession in the "twilight period" between the service of forfeiture proceedings and the making of any later order for possession and that during that period it was the tenant who was entitled to possession. The new proceedings were therefore no answer to the possession claim of that tenant now or in an early trial of the current proceedings. He further considered it would be undesirable for it to be otherwise because otherwise a landlord could eject a tenant unlawfully and then resist keeping the tenant out by bringing later forfeiture proceedings on a different basis.

98. Mr Trompeter challenged these findings. He started by pointing up the principle that on a summary judgment application the court should have an eye to additional evidence

that might plausibly become available at a trial, and the new possession claim amounted to such evidence. Then he challenged the judge's finding about a twilight period, submitting that the lease came to an end on service of the forfeiture proceedings and there was no twilight period which gave the tenant a technical right to possession between service and trial. The judge's view on undesirability was not supported by authority and Mr Trompeter referred to *Fuller v Judy Properties* (1992) 64 P&CR 25.

99. I will deal with the "new evidence" point first. It comes from paragraph (v) in *Easyair* above. What the court must consider on a summary judgment application is the evidence before it and "the evidence that can reasonably be expected to be available at trial." That is uncontroversial. However, the evidence that Lewison J referred to is evidence relevant to the issues in a putative trial of the action in which the summary judgment application is brought. That is obvious, and it does not describe the future "evidence" which Mr Trompeter relies on in this case. The evidence about the Chapter 11 proceedings and the section 146 notice, and evidence in relation to the inevitable relief claim (which I was told has been made) is not of the slightest relevance to the present action. No trial of the present action is necessary to allow that evidence to be brought. If a full trial of the present action were brought that evidence would be inadmissible. If it were to take place at the same time as the forfeiture proceedings which have now been issued then its determination would be precisely the same, save perhaps for how the possession aspect is dealt with, which is matter of relief, not trial issues. The "compelling reason" argument therefore fails at this starting point.

100. What Mr Trompeter is really seeking, on analysis, is a form of stay. That is a different concept and would require different evidence. It was not a matter urged before the judge below.

101. I was treated to a detailed analysis of a number of authorities which go to the question of whether the "twilight period' really exists in the form of the period apparently found by the judge. Mr Trompeter submitted that the judge below was wrong to find that there was some sort of twilight period in a forfeiture action during which the tenant had a right to possession which would come to an end if the forfeiture claim succeeded, with the effect backdated to the claim form. He submitted that the position was, and always has been, that service of the claim form effected the forfeiture by way of a communication of the election of the landlord to forfeit – see *Serjeant v Nash Field & Co* [1903] 2 KB 304 at 311, and *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433. That was said to support his case that it would be wrong to give possession now. Mr Faulkner, who took the argument on this Ground for the landlords, adopted the twilight argument (pointing out that it seemed to have been accepted by counsel for the new occupiers in argument below).

102. I do not consider that it is necessary to embark on an in-depth of analysis of the various authorities that were cited on this point, though I remain unconvinced that a relevant twilight period of a tenant's entitlement to possession exists as the judge held it does. It is unnecessary to develop this point because either way I do not consider that the present position provided a compelling reason to have a trial of this action at some indeterminate point in the future. Let it be assumed that service of the claim form would effect a forfeiture with the legal consequence that it turns out that the tenant had no right to possession in the period between the service of the claim form and the trial (albeit that that is only determined at the trial). That means that, as from the date of service, the landlord becomes entitled to possession, as is subsequently determined

(subject to the possibility of relief from forfeiture). Prior to that time he is not entitled to possession and the tenant is. As at the date of the issue of the present proceedings, and as at the date of the summary judgment application, the tenant was entitled to possession. The landlords had issued, but not served, their forfeiture proceedings. The declaration that the forfeiture was invalid carries with it the necessary legal consequence that the tenant is entitled to possession. It follows from that that a possession order should be made as of right. I am not aware of any discretion not to make a possession order in those circumstances.

103. Mr Trompeter's case proceeds on the apparent inevitability of the landlords' being entitled to possession in the subsequent forfeiture proceedings. However, this matter does not present that simple position. The right to forfeiture will be contested on substantial grounds. Furthermore, now that the proceedings have been served and a Defence and Counterclaim filed, it is apparent that the tenant is applying for relief from forfeiture (not surprisingly). It is not suggested that that counterclaim is hopeless. So the suggestion is that the making of a possession order in the present case, to which the tenant is apparently presently legally entitled, should await the trial of that seriously contested litigation because that litigation is a compelling reason for a trial of an issue which otherwise can be determined now. When put like that the suggestion can be seen to have no sensible foundation. I would add that the suggestion is even less attractive when one realises (as is apparently the case) that the progress to a trial of the new forfeiture action would seem to be slow. I was told that the first CMC in that action is to be in October 2024, which is over 13 months after the date of the issue of those proceedings.

104. I therefore find that there is no other compelling reason for a trial. As at the date of the issue of these proceedings, and as at the date of the summary judgment application, and indeed as at the date of this appeal, on the basis of the findings and determinations about the applicability of the moratorium Empire was entitled to possession and there is nothing more which it would be relevant to try. In *HRH the Duchess of Sussex v Associated Newspapers* [2021] 4 WLR 35 it was observed by Warby J that:

> "It is rare for the Court to find a compelling reason for a trial, when it has concluded there is only one realistic outcome." (see paragraph 16)

That must be right, as a matter of logic. This case is not one with that element of rarity. The proposal that there be a trial is actually a proposal that the inevitable possession order should not take effect because later developments mean that it might be the case that the landlords (or the new occupiers) end up with possession after all, which, as I have observed, is probably a disguised application for a stay. It is no reason for a trial of issues which can be and have been determined now.

105. This Ground of Appeal fails.

Ground 4 – costs order against the third and fourth defendants

106. On the consequentials hearing below the judge ordered all the defendants, including the new occupiers (the third and fourth defendants) to pay the claimant's costs of the proceedings (save for some costs which are immaterial for these purposes). This

Ground proposes that the judge was wrong to order the third and fourth defendants to pay the costs prior to the date of their joinder in the proceedings.

107. The judge's reasoning on costs was not before me because the appellants did not have, or at least did not provide, a transcript of that part of the proceedings. I therefore did not know what reasons, if any, the judge had for making the order that he did. During the course of his submissions Mr Trompeter sought to introduce that transcript, which apparently comprised 25 or so pages of debate and shot rulings, without identifying (at that point) which parts he was relying on. I refused to allow the late introduction of material which was obviously crucial to this debate and which ought to have been made available earlier, so Mr Trompeter was not able to take this part of the appeal any further.

108. This Ground therefore fails.

Conclusion

109. I therefore find that this appeal fails in all respects. Since this is a wrapped up hearing I need to decide whether and to what extent I refuse permission to appeal as opposed to dismissing the appeal. Bearing in mind the levels of success in, and the nature of, the argument, and considering the extent to which it can be seen that seen that an appeal would have real prospects of success (within the rules), I would dispose of the appeal as follows:

Ground 1(a) (statutory construction)– I give permission to appeal and dismiss the appeal

Ground 1(b) (illegality) – I refuse permission to appeal.

Ground 1(c) (waiver/estoppel/abandonment) – I refuse permission to appeal.

Ground 2 (some other compelling reason for trial) – I refuse permission to appeal

Ground 3 (inappropriateness of a summary judgment application) – I refuse permission to appeal

Ground 4 (costs) – I refuse permission to appeal

110. The costs and other consequences of this judgment, if controversial, will be decided on a date to be fixed after the hand-down of this judgment in the normal way.