Case No: C01BR087

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand, London
WC2A 2LL

25 January 2022

BEFORE:

HIS HONOUR JUDGE LUBA QC

BETWEEN:

DEAN GOLDING

Claimant

- and -

DEBORAH ELLEN MARTIN

Defendant

Hearing dates: *13-15 December 2021*

Ms Nicola Muir appeared on behalf of the Claimant

Mr Faisel Sadiq appeared on behalf of the Defendant

JUDGMENT

I direct that no recording shall be taken of this Judgment and that copies of this version as sealed and handed down may be treated as authentic.

Introduction

1. This judgment is intended to be the final chapter in what has been described as "a cautionary tale about the danger to a lessee in leaving a flat unoccupied and moving abroad without giving the landlord a forwarding address for correspondence."[1]

2. Ms Deborah Martin, the defendant, was the lessee of a flat in Mottingham Court, a modest block of flats situated in Sidcup in south east London. She held under a long lease, initially granted in 1983 for a 50-year term, which she had acquired in 1986. That original lease had later been replaced by a new lease extending the term to 140 years, in return for a substantial premium.[2] That new lease incorporated the terms of the previous lease. Those terms included an obligation to pay a service charge, which was reserved as rent. Under the terms of the lease, it was liable to forfeiture if the rent remained unpaid for 21 days.

3. In 2003, Ms Martin moved to live and work in Majorca, taking up new employment there as a housekeeper and leaving her flat unoccupied. She left no forwarding address. Ms Martin returned to the UK from time to time, for short periods, and stayed with relatives. In her absence, she left it to her brother Paul and later his adult daughter (her niece) Lauren to keep an eye on the flat for her. Her long-term plan was to keep the flat for her retirement.

4. In 2012, the claimant, Mr Dean Golding, acquired the block of flats and with it the reversion to Ms Martin's lease. He works in the property field. The block was at that time unoccupied and in poor condition. He carried out extensive refurbishment work to the block and to Ms Martin's flat.

5. There was a dispute about how much of the cost of that work fell within the scope of the service charge. Ms Martin left her brother to deal with the dispute, with the aid of a surveyor called Nigel Watson. In September 2013, an email sent from Ms Martin's email address to Mr Golding's agent expressly authorised Mr Watson to act on her behalf in respect of the flat. It was the direct last communication received from her by Mr Golding or his agent.

6. In addition to a surveyor, Ms Martin's brother also instructed solicitors to help Ms Martin. They were Parker Arrenberg, who also acted for her on the grant of the new lease. A Mr Harrington, who was then employed by Mr Golding's solicitors (Wannops

[1] *Golding v Martin* [2019] EWCA Civ 446, [2019] Ch 489 at [1]

[2] Pursuant to a decision of the First-tier Tribunal Property Chamber made on 25 November 2013 under the Leasehold Reform, Housing and Urban Development Act 1993 fixing the premium to be paid as £67,507.

LLP), asked Parker Arrenberg at least twice (in July and August 2015) for a correspondence address for Ms Martin. But the requests went unanswered.

7. In November 2015, Mr Golding's solicitors sent by post a demand for service charges addressed to Ms Martin at the flat. A copy was also sent to Mr Watson, the surveyor.

Following that, and in the light of non-payment, an application was made to the Firsttier Tribunal ('FTT') for determination of the amount that Ms Martin was required to pay by way of service charge.

8. On 23 February 2016, the FTT decided that her liability was £11,794.66.[3] The sum being unpaid, Mr Golding applied to the county court for judgment. Accordingly, money judgment for the claimed sum was given by the county court at Bromley on 20 April 2016.

9. On 15 June 2016, Mr Golding began these proceedings in the county court at Bromley. They are in the form of a possession claim brought under CPR Part 55. The claim form records the grounds of the claim as "forfeiture of the lease" and sought an order for possession. The proceedings were served by postal delivery to the flat.

10. On 15 July 2016, at the hearing conducted on the fixed date given upon issue of the claim, Mr Golding was represented by his solicitor. Ms Martin did not attend and was not represented. DDJ Thomas read a witness statement made by Mr Harrington on 8 June 2016 and granted an order for possession.

11. On 23 August 2016, Mr Golding took possession of the empty flat. On 17 October 2016, he granted a new 150-year lease of it to his daughter, by way of gift. She subsequently sold it to a third-party purchaser for £290,000.

12. In early December 2016, Ms Martin was first told about the possession order by her niece Lauren. She instructed solicitors. No application was made for relief from forfeiture. Instead, on 23 January 2017, Ms Martin applied to have the order of DDJ Thomas set aside under CPR Part 39.3(5) on the basis that it had been obtained at a hearing that she had not attended for good reason (she had not known about it). That application came before DDJ Mohabir on 27 June 2017. He dismissed it. Ms Martin appealed. On 2 March 2018, her appeal was allowed and the application to set aside the possession order was remitted for re-hearing.

13. However, Mr Golding obtained permission to bring a second appeal to the Court of Appeal. Ms Martin put in a Respondent's Notice contending that the possession order

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[3] *Mr D Golding v Ms D E Martin* (London: Section 27A) [2016] UKFTT RP_LON_00AL_LSC_2015_0478 (23 February 2016).

was defective[4] with the consequence that she was entitled to have it set aside as of right. The Court of Appeal found that the new point was "a good one. DDJ Thomas made an order which he had no power to make; and the court should set it aside."[5]

14. On 15 March 2019, the Court of Appeal made an order which set aside the order made back on 15 July 2016 by DDJ Thomas. It remitted the matter "for the hearing of the possession claim on a date to be fixed by the county court". That re-set the proceedings back to first base.

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15. There was then a delay. No formal steps were taken by the courts or the parties. A year later, on 11 March 2020, Ms Martin filed a Defence to the claim. She contended that the right to forfeit for non-payment of the service charges had been waived by certain acts of Mr Golding's solicitors and agents in April 2016. Additionally, she made a Counterclaim. If the lease had been forfeit, the Counterclaim sought relief from forfeiture (under either County Courts Act 1984 section 138 or Law of Property Act 1925 (LPA) section 146[5]). Alternatively, it sought damages of £290,000 by way of 'unjust enrichment'. By his Reply, Mr Golding denied that there had been any waiver. By his Defence to Counterclaim, he denied that anything was payable to Ms Martin.

16. The proceedings were thereafter stayed by provisions made in relation to possession claims in consequence of the COVID 19 pandemic.

17. Eventually, on 13 December 2021, they came on for trial before me over three days. Mr Golding was represented by Ms Muir and Ms Martin by Mr Sadiq. They gave considerable assistance to the Court not simply by the quality of their oral and written submissions but by their agreement of a sensible List of Issues for determination by the Court.

18. At trial, I heard and read the evidence of Mr Golding himself, his managing agent Mr Lally, and Mr Harrington of his solicitors. In response, I heard and read the evidence of Ms Martin and that of her niece Lauren. I read the evidence of her solicitor Ms Grindley. Ms Martin led no evidence from her brother Paul or from the surveyor, Nigel Watson

19. The Trial Bundle was presented in three volumes extending to almost 1000 pages, very few of which were, as usual, referred-to at the hearing. It was accompanied by a very substantial bundle of some 19 authorities and materials.

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[4] Because it was not made in accordance with County Courts Act 1984 s138(3). [5]
Golding v Martin [2019] EWCA Civ 446, [2019] Ch 489 at [28].

[5] By the time of trial, the parties were in agreement that LPA 1925 s146 had no relevance to either the claim or defence and counterclaim in respect of forfeiture for non-payment because the service charges had been reserved by the lease as 'rent'. Although other breaches of the lease have been the subject of section 146 notices and had been pleaded in the particulars of claim, I was not invited to deal with those matters. I shall therefore not address the application of, or any 'relief' sought under, section 146.

20. Even in a judgment of this length I cannot sensibly summarise everything I heard or read in evidence or determine each and every dispute of fact however tangential its relevance. My not mentioning a particular matter should not be treated as my having overlooked it. I have taken into account everything that was before me but distilled into this judgment only such as is necessary for the parties to understand what I have decided and why.

21. The closing submissions of each party concluded on the afternoon of the third day of trial but, at the Court's instigation, counsel were invited to consider the potential relevance of an additional precedent[6] and (if so advised) to make further submissions on it. I reserved judgment to be handed down after receipt of those submissions and indicated that I would deliver judgment thereafter on the first date convenient to the availability of trial counsel and to the Court. Neither party made further submissions and the judgment is now being delivered on the first convenient date.

22. Before I turn to my findings of fact (so far as necessary) and my determinations on the Agreed Issues, I need to set out the relevant terms of the lease and the relevant statutory provisions.

The lease

23. The new 140 year lease made between these parties in May 2014 provided at Clause 3.1 that, subject to presently immaterial exceptions, "this lease is made on the same terms and subject to the same covenants, provisos and conditions as are contained in the Old [1983] Lease as if they were set out in this lease in full."

24. The Old Lease set out the Tenant's covenants at Clause 2. By Clause 2(1) the tenant covenanted to pay the rent as due and by Clause 2(13) to pay service charges calculated in accordance with Schedules 4 and 5. The service charges were reserved by Clause 1 as 'additional rent'. The Old Lease then set out the Landlord's covenants at Clause 3. At Clause 4 it contained a proviso for re-entry providing that (so far as presently relevant):

> "…if the rent hereby reserved or any part thereof shall be unpaid for twenty one (21) days after becoming payable (whether formally demanded or not) …then and in any such case it shall be lawful for the landlord …at any time thereafter to re-enter the demised premises or any part thereof in the name of the whole and thereupon the term hereby created shall be absolutely determined …"

The statutory provisions

[6] *Sheffield CC v Wall* [2010] EWCA Civ 922

25. In the county court, forfeiture of a lease for non-payment of rent is governed by the County Courts Act 1984 sections 138 and 139.

26. Section 138 provides, so far as material:

> (1) This section has effect where a lessor is proceeding by action in the county court (being an action in which the county court has jurisdiction) to enforce against a lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent.
>
> (2) If the lessee pays into court or to the lessor not less than 5 clear days before the return day all the rent in arrear and the costs of the action, the action shall cease, and the lessee shall hold the land according to the lease without any new lease.
>
> (3) If—
>
> (a) the action does not cease under subsection (2); and
>
> (b) the court at the trial is satisfied that the lessor is entitled to enforce the right of reentry or forfeiture,
>
> the court shall order possession of the land to be given to the lessor at the expiration of such period, not being less than 4 weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court or to the lessor all the rent in arrear and the costs of the action.
>
> (4) The court may extend the period specified under subsection (3) at any time before possession of the land is recovered in pursuance of the order under that subsection.
>
> (5) If—
>
> (a) within the period specified in the order; or
>
> (b) within that period as extended under subsection (4), the lessee pays into court or to the lessor—
>
> (i) all the rent in arrear; and (ii)
> the costs of the action,
>
> he shall hold the land according to the lease without any new lease.
>
> (6) …
>
> (7) If the lessee does not—
>
> (a) within the period specified in the order; or
>
> (b) within that period as extended under subsection (4), pay into court or to the lessor—
>
> (i) all the rent in arrear; and
>
> (ii) the costs of the action,
>
> the order shall be enforceable in the prescribed manner and so long as the order remains unreversed the lessee shall, subject to subsections (8) and (9A), be barred from all relief.
>
> (8) The extension under subsection (4) of a period fixed by a court shall not be treated as relief from which the lessee is barred by subsection (7) if he fails to pay into court or to the lessor all the rent in arrear and the costs of the action within that period.
>
> (9) Where the court extends a period under subsection (4) at a time when—
>
> (a) that period has expired; and

(b) a warrant has been issued for the possession of the land, the court shall suspend the warrant for the extended period; and, if, before the expiration of the extended period, the lessee pays into court or to the lessor all the rent in arrear and all the costs of the action, the court shall cancel the warrant.

(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.

(9B) Where the lessee is granted relief on an application under subsection (9A) he shall hold the land according to the lease without any new lease.

27. Section 139 provides:

(1) In a case where section 138 has effect, if—

(a) one-half-year's rent is in arrear at the time of the commencement of the action; and
(b) the lessor has a right to re-enter for non-payment of that rent; and

(c) the power under section 72(1) of the Tribunals, Courts and Enforcement Act 2007 (commercial rent arrears recovery) is exercisable to recover the arrears; and

(d) there are not sufficient goods on the premises to recover the arrears by that power,

the service of the summons in the action in the prescribed manner shall stand in lieu of a demand and re-entry.

(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.

(3) Subsections (9B) and (9C) of section 138 shall have effect in relation to an application under subsection (2) of this section as they have effect in relation to an application under subsection (9A) of that section.

28. The terms of section 138 are of importance to the present case not least because, in Mr Sadiq's contention, they entirely control and determine the outcome of the present claim, leaving only the counterclaim for unrestricted determination by the Court.

29. The rights of a landlord to enforce payment of monies due as service charges are controlled in respect of residential premises by the terms of Housing 1996 section 81 as amended by the Commonhold and Leasehold Reform Act 2002 section 170. So far as material, they provide that:

Restriction on termination of tenancy for failure to pay service charge.

(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless—]

(a) it is finally determined by (or on appeal from) the appropriate tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or

(b) the tenant has admitted that it is so payable.

(2) The landlord may not exercise a right of re-entry or forfeiture by virtue of subsection (1)(a) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(3) For the purposes of this section it is finally determined that the amount of a service charge or administration charge is payable—

(a) if a decision that it is payable is not appealed against or otherwise challenged, at the end of the time for bringing an appeal or other challenge, or

(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge…

(3A) – (5) …

(5A) Any order of a court to give effect to a determination of the appropriate tribunal shall be treated as a determination by the court for the purposes of this section.

(6) Nothing in this section affects the exercise of a right of re-entry or forfeiture on other grounds.

30. In the instant case, there is no issue about the satisfaction of those provisions. Mr Golding obtained a determination of the service charges from a tribunal, he obtained a judgment of the Court to give effect to the tribunal's determination, and he neither began the present claim nor re-entered the premises prematurely.

The Issues

31. The trial was conducted within the framework of the following issues agreed by counsel and approved (in outline) at a Pre-trial Review. The issues agreed were:

1. Was C entitled to forfeit when he did or had he by that date waived the right to forfeit?

2. Did C forfeit by peaceable re-entry of the Property on 23rd August 2016?

3. Did C forfeit pursuant to the Court Order dated 8th August 2016 which was found to be invalid by the Court of Appeal on 15th March 2019?

4. If C was entitled to forfeit and obtained possession pursuant to the invalid Court Order:

(1) Is it correct that the period for applying for relief from forfeiture referred to in s.138(9A) of the County Courts Act 1984 applies and has not yet commenced?

(2) If so, should the Court exercise its discretion to grant relief from forfeiture and, if so on what terms.

(3) If the Court grants relief from forfeiture, can D also claim damages?

(4) If the Court refuses relief from forfeiture, should the Court award D damages?

(5) What damages can the Court award where possession has been taken pursuant to a Court order which has subsequently been set-aside?

5. If C was entitled to forfeit and obtained possession by peaceable re-entry?

(1) Is D out of time for applying for relief from forfeiture by virtue of s. 139(2) of the County Courts Act 1984?

(2) If not, should the Court exercise its discretion to grant relief from forfeiture?

(3) Is there any basis on which D would be entitled to damages?

6. If C had waived the right to forfeit should D be granted damages for unjust enrichment arising from the loss of her lease?

7. If D is entitled to damages, what is the quantum of those damages?

32. The evidence led at trial was addressed to all the Issues on the footing that each was in contestation. However, in the course of his closing submissions and having taken explicit instructions, Mr Sadiq invited the Court: (a) to receive a formal written notice admitting certain facts; and (b) to permit the amendment of the Defence by deletion of certain matters. The invitation was unopposed. I received the notice and permitted the amendment.

33. By the formal admission, Ms Martin admitted that:

1. By the Defendant's lease:

(a) she covenanted to pay service charge…

(b) [any] service charge is to be treated as additional rent under the lease…

(c) if rent is unpaid for 21 days, the Claimant is entitled to re-enter the Property and thereby forfeit the Defendant's lease…

2. On 23 February 2016, the Claimant obtained a determination from the First-tier Tribunal that the Defendant owed him the sum of £11,794.66 as unpaid service charge in respect of her lease... For the avoidance of doubt the Defendant admits Paragraph 2 of the Particulars of Claim and repeats Paragraph 6(b) of the Defence.

> 3. By virtue of Paragraphs 1 and 2 (above), the Claimant is entitled to forfeit the Defendant's lease of the Property for the purposes of s.138(3)(b), County Courts Act 1984. To this extent, the Defendant admits Paragraph 5 of the Particulars of Claim.

34. By the amendments to the Defence (in respect of which I waived the requirement for filing and service of an amended statement of case), the following provisions were deleted:

    a. in paragraph [6], subparagraphs (a) and (c);

    b. in paragraph [7], the second sentence and the Particulars; and

    c. in paragraph [11], the whole paragraph.

35. In addition, the following words are added to the end of paragraph [10]: "save in respect of non-payment of the service charges pleaded at paragraph 2 of the particulars of claim."

36. The effect of the amendments is that (a) the contention that the breach of the lease had been waived is abandoned and (b) it is acknowledged and accepted that the landlord (Mr Golding) was entitled to forfeit the lease by re-entry as a result of the breach of the lease in respect of the unpaid service charges.

37. Mr Sadiq made it clear that these steps were being taken, upon his client's instructions, in order to underscore and reinforce his contention that the present claim fell to be exclusively determined within the four corners of section 138 (and thus it entitled his client to the relief for which that section provided). Their designed effect was to achieve a finding that, for the purposes of section 138(3)(b) "the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture." Taken together with a finding he invited the Court to make that the claim had "not ceased by operation of subsection [138](2)", the inevitable outcome would be that his client would be entitled to relief from forfeiture by paying the service charges within a period of at least four weeks after my making an order for possession.

38. Indeed, he supports all of his argument in answer to the claim with the following passage from the Court of Appeal's judgment in this very case:

> "…if the order made by DDJ Thomas is set aside, there is only one order that the court can make; namely an order in the form required by section 138(3). There is no discretion for the court to exercise. … If the order is set aside, and a new trial or hearing takes place, ***Ms Martin will obtain an order which is far more favourable to her than the order that is currently in place.*** In our judgment, that will be a "success". ***As well as giving her the right to relief against forfeiture, it will also be more favourable both in terms of the period allowed for paying the arrears; and the terms of payment***."[7] [Emphasis added]

[7] *Golding v Martin* [2019] EWCA Civ 446, [2019] Ch 489 at [39].

Issue 1: Was Mr Golding entitled to forfeit when he did or had he by that date waived the right to forfeit?

39. The effect of the amendments and omissions recorded above is that, on this first issue, there is no longer any assertion that the breach was waived and it is accepted that a breach occurred which entitled the landlord to re-enter and thereby forfeit the lease. In consequence, the relevance of much of the evidence that I heard and read at trial falls away and there are few, if any, factual disputes that fall for my decision.

40. The only part of the issue left for determination is whether Mr Golding was entitled to forfeit "…when he did…".

41. That requires a decision on when Mr Golding did in fact forfeit Ms Martin's lease.

42. The relevant law as to forfeiture is neatly distilled as follows:

> "At common law there are two distinct methods by which a landlord may forfeit a lease. He may either forfeit by peaceful physical re-entry; or by legal proceedings. In the case of residential property, the first of these methods is subject to statutory restrictions. Section 2 of the Protection from Eviction Act 1977 provides:
>
> > "Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them."[8]

43. In the instant case, the flat had been empty since Ms Martin left the UK in 2003. Noone was lawfully residing there in 2016. It follows that section 2 of the 1977 Act did not apply. Mr Golding could forfeit by peaceful physical re-entry or by legal proceedings.

44. In an excess of caution, he issued the present claim. But his particulars of claim read, at [11]:

> "The claimant seeks in the alternative and in addition to the above grounds that the Court determine that the Claimant is entitled to seek peaceable entry and possession of the premises under the terms of the Lease and in accordance with section 1(2) Protection From Eviction Act 1977 on the basis that it is reasonable to assume that the tenancy has come to an end."

45. The witness statement filed in support of those particulars and made by Mr Harrington, who also signed the statement of truth to the particulars of claim, reads:

> "[11] I believe that the property is completely uninhabited and has been so since 2009…
> …
> [14] This does not seem to be a temporary absence from the property on the basis of the information that has been provided. However, I believe in order to protect the Claimant from

[8] *Gibbs v Lakeside Developments Ltd* [2018] EWCA Civ 2874, [2019] 4 WLR 6 at [35], per Lewison LJ.

> any potential sanctions for taking possession under the provisions of the terms of the lease by way of peaceable re-entry, it is important that the court's Order is obtained to confirm that the Claimant has the right to seek forfeiture of the property"

46. The transcript of what then occurred when Mr Harrington appeared before DDJ Thomas on 15 July 2016 is not before this Court, but it produced an order that the "leasehold…be forfeited and that possession of the flat be granted to the Claimant."

47. Because that order has been set aside, it cannot be said that it operated to forfeit the lease. However, it is not in dispute, on the facts, that Mr Golding re-entered and took possession on 23 August 2016.

48. In another case of an absentee flat owner, against whom a possession order had been obtained and the landlord had thereafter re-entered, the Court of Appeal considered at what point the forfeiture had occurred. It stated that:

> [37] …Where a landlord chooses to forfeit a lease by legal proceedings the settled case law says that the moment of forfeiture is the time at which the proceedings are served on the tenant: …However, in the present case both the District Judge and the Circuit Judge have held (for different reasons) that the proceedings were not served…. So those proceedings cannot have effected the forfeiture.
>
> [38] The landlords obtained an order for possession…. Following that judgment, the landlords entered into possession of the flat on 28 April 2010. That, as it seems to me, must have been the time of the operative forfeiture. Since there was no bar in this case to physical re-entry, that exercise of the right to forfeit was lawful.[9]

49. Applying that analysis to the present case, the proceedings in this case were served at the flat (irrespective of whether they came to the attention of Ms Martin at the time). Indeed, in photographs adduced at trial, the separate mailbox to the flat was seen to be completely overflowing with mail and had not been opened by Ms Martin's brother Paul or her niece Lauren for months, if not years. So, a forfeiture here may well have occurred at the date of service.

50. But even if that be wrong, it certainly occurred on 23 August 2016 when re-entry was effected and possession taken. That sufficiently answers the question of "when", for the purposes of issue 1.

Issue 2: Did Mr Golding forfeit by peaceable re-entry of the Property on 23 August 2016?

[9] *Gibbs v Lakeside Developments Ltd* [2018] EWCA Civ 2874, [2019] 4 WLR 6 at [35], per Lewison LJ with whom Coulson LJ agreed.

51. I find as a fact, to the extent that it is not already expressly or impliedly admitted, that Mr Golding did forfeit the lease by peaceable re-entry on 23 August 2016. The answer to the question posed by this issue is 'yes'.

52. As a result of the admissions made by Ms Martin, he had been entitled to re-enter by dint of her breaches of the lease on the date he did so. There was no statutory inhibition on him doing so as the flat was empty, and no-one was residing there. For good measure, he had the added authority of a court order, still then extant, entitling him to recover possession.

53. This is a convenient point at which to record that, on Mr Golding's application, Ms Martin's lease was expunged from the Land Registry's register of title a few weeks later in early September 2016.

Issue 3. Did Mr Golding forfeit pursuant to the Court Order dated 8 August 2016 which was found to be invalid by the Court of Appeal on 15 March 2019?

54. It is incorrect to suggest, as the framing of the Issue does, that the Court of Appeal found the order made by DDJ Thomas to be 'invalid'. Certainly, it was not an order that ought to have been made. What the Court actually said was:

> We do not need to decide whether the order made by DDJ Thomas is a nullity; or whether it is simply one that must be set aside. It makes no difference to the outcome of the appeal.[10]

55. The function of the words "pursuant to" in the framing of this Issue seems to be to import the suggestion that there is a need to relevantly find what was in the mind of Mr Golding when he re-entered in August 2016.

56. Mr Sadiq pointed to the content of Mr Golding's evidence and in particular to his pleading that he had re-entered the property on 23 August 2016[11] and that he "took possession pursuant to the Order".[12] He contends that a landlord cannot be heard to say in the same case *both* that he recovers possession under an Order of the Court and that he recovers possession under a right of re-entry at common law. He relies on the proposition that a party may "not approbate and reprobate".[13]

[10] *Golding v Martin* [2019] EWCA Civ 446, [2019] Ch 489 at [29].
[11] Defence to Counterclaim para [13].
[12] Reply para [12].
[13] Reply to Defence to Counterclaim at [3]

57. I reject the proposition that there is any need, in the circumstances of this case, to examine the subjective intention of Mr Golding on 23 August 2016 beyond finding, as I do find, that he was taking physical possession of the flat in response to the breach by Ms Martin in not paying her service charges.

58. The proposition that there is some subjective element required does not fit with the regular and lawful recovery of possession by corporate landlords (who have no 'mind' or 'subjectivity'). Nor with the express statement by the Court of Appeal (in *Gibbs v Lakeside*) that where a landlord re-enters *pursuant to* a possession order which is later set aside the re-entry is nevertheless lawful if made in accordance with the lease.[14]

59. Nor is Mr Golding arguing for both of two inconsistent alternatives which is what the restraint on "approbate and reprobate" is concerned with. I accept Ms Muir's submissions, based on *Twinsectra*,[16] that the doctrine has no application on the facts of this case. Motivated by whatever immediate reason, what Mr Golding was doing was to take possession in exercise of his rights.

Issues 4 and 5: the impact of County Courts Act 1984 section 138

60. I have already set out the rubric of these two issues (at [31]) but because each is concerned with the impact of section 138 on the facts of this case, I shall take them together.

61. First, I summarise Mr Sadiq's approach. He submits that I must grant a possession order on Mr Golding's claim. That, he contends, is the force of section 138. Such outcome is required of the Court notwithstanding that:

    a. Mr Golding seeks no such order;

    b. a new leasehold owner is and has for some time been in possession of the flat;

    c. the new owners are not parties to the proceedings; and

    d. Ms Martin does not herself seek to enforce any remedy which will oust them and restore her.

    He submits that whatever may have occurred 'on the ground', this remains, for the purposes of section 138(1), an "action in the county court to enforce against a lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent." Further, that action has not "ceased under subsection (2)" and – in light of the admissions and

[14] *Gibbs v Lakeside Developments Ltd* [2018] EWCA Civ 2874, [2019] 4 WLR 6 at [22] and [42] [16] *Twinsectra Ltd v Lloyds Bank PLC* [2018] EWHC 672 (Ch)

findings above – "the lessor is entitled to enforce the right of re-entry or forfeiture". These are the two preconditions in section 138(3).

62. Accordingly, he contends that I am obliged to make an order for possession (section 138(3) uses the word "shall"). Further, I am required to defer that order for a period which will enable Ms Martin to pay the arrears of service charges she owes and the costs of the action. Because she now is said to have the ability to pay her service charges and costs within a reasonable period no physical repossession of the property need be taken by her because upon timely payment she "shall hold the land according to the lease without any new lease" by operation of section 138(5) alone. This, he submits, is the very outcome postulated by the Court of Appeal in the passage extracted above. The 2016 Order having been set aside Ms Martin is "entitled to be placed back into the position she was in before the possession order was made – i.e. have restored to her both her lease and possession of the property".[15]

63. Mr Sadiq bolstered these submissions by reference to a supplementary skeleton argument dated 3 March 2019 submitted to the Court of Appeal by then leading and junior counsel for Mr Golding. It stated that if that Court did set aside the order of DDJ Thomas, Mr Golding could simply "withdraw [the current] proceedings"[16] and rely upon the re-entry on 23 August 2016. He pointed to the fact although the Court of Appeal had indeed set aside the 2016 order, the proceedings were still extant. There had been no notice of discontinuance. If - as they did – the provisions of section 138 still governed the claim, the outcome for which he contended was the inevitable result.

64. Second, I summarise Ms Muir's approach. She submits that the proceedings were (as explained at [[44] above) simply a belt and braces exercise to underscore the landlord's common law right to effect lawful re-entry for what is now an *admitted* breach that had

triggered a right to *lawful* re-entry. Having in fact re-entered and obtained possession, after the making of the Order now set aside, Mr Golding no longer seeks a possession order from the present proceedings. He cannot be compelled to seek a remedy he no longer wants. The claim is only alive at all because the defence of 'waiver' put in issue – until the admission on the last day of trial – the question of whether there had, on the facts, been a right of re-entry at all.

65. I accept Ms Muir's submissions, and not simply because those of Mr Sadiq (despite their attractive presentation) have an air of artificiality and lack any connection to the reality that an admittedly lawful re-entry took place now five and a half years ago.

66. Mr Golding cannot be forced in the present claim to obtain a remedy he no longer needs. He does not seek a possession order. That much has been clear since - at the very latest

[15] Defence and Counterclaim at [25].

[16] This must be a slip. Proceedings cannot be 'withdrawn'.

- 8 July 2020, the date of the Reply. It set out in its opening paragraph "the Claimant no longer seeks possession of the property".

67. Nor is he obliged to *discontinue* his claim to avoid a 'trap' sprung by section 138. As CPR 38.1(2) expressly provides, a claimant who claims more than one remedy and then abandons his claim to one or more of the remedies but continues with his claim for other remedies is not treated as 'discontinuing' and is not required to give Notice of Discontinuance. Mr Golding's claim sought relief otherwise and beyond possession (not least, mesne profits and costs) and had expressly invited[17] an affirmation of his right to lawful re-entry without a possession order. That latter remained of significance until the very last day of the trial before me when the defence of waiver was abandoned.

68. True it is that section 138 is "designed to give relief against forfeiture to tenants. For that reason, the court should eschew a literal interpretation of words unless driven to do so."[18] In my judgment it is equally true that the sub-provisions of the section cannot be artificially forced into play in circumstances where, as a matter fact they have no relevant application. Indeed, section 138(3)(b) is directed to a case in which the Court is being invited to determine whether a landlord "is entitled to enforce the right…". The present tense is apt to a case in which the proof of entitlement is a pre-requisite to the making of an order which will forfeit the lease. In my judgment, it has no application to a case in which – by the time the claim gets to trial – the landlord has long since lawfully forfeited by re-entry.

69. It seemed to me that Mr Sadiq's best point was that the Court of Appeal had itself contemplated the very outcome he now sought – see [38] above. But appearances can be deceptive. What was said by the Court was not part of the *ratio.* It might well have been driven by the knowledge that, by her Respondent's Notice before them, Ms Martin appeared to wish to put a positive case in the possession proceedings that there had been no right of lawful re-entry by dint of the alleged waiver. It is not appropriate to speculate.

70. In any event, I cannot accept that in a claim in which an order for possession is no longer sought by the claimant, and in which the defendant cannot deliver up possession, I must – by force of provisions designed to protect leaseholders – make a possession order that will operate against the world (including the present occupiers) some five years after the claimant has already lawfully recovered possession and thereby ended the lease.

71. To my mind, the only potentially applicable provision of section 138 is subsection (9A). It will be recalled that this provides that:

[17] At [11]

[18] *Golding v Martin* [2019] EWCA Civ 446, [2019] Ch 489 at [25].

> 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.

72. This provision was considered by the Court of Appeal in *Gibbs* to be potentially applicable where a landlord had exercised a right of re-entry that was good at common law but that had occurred following the making of a possession order that may have been irregular and might well have been set aside (because it was made in proceedings that had never been served).

73. Indeed, the decision in *Gibbs* sets out the reach of the county court's powers in respect of section 138(9A). Lewison LJ stated that:

> Since the county court is a court created by statute, it can in principle do only what the statute permits it to do. Moreover, where Parliament has imposed a particular time limit on an application for relief against forfeiture, that implicitly ousts any broader jurisdiction that the court may have: … Ms Gibbs did not apply for relief against forfeiture until 21 October 2011, nearly one and a half years after the landlords had recovered possession. By that time. I consider that it would have been too late for the county court to have granted her relief against forfeiture. For as long as the proceedings stayed in the county court, whether or not the possession order was set aside could have made no difference to the consequences of the landlords' lawful exercise of their right of forfeiture.

74. In my judgment, section 138(9A) *potentially* applies here because I am trying a claim in which a possession order has previously been made, re-entry has been lawfully taken after it, and relief from forfeiture is now sought by way of Counterclaim.

75. But, even if that is right, it is now too late. Re-entry was made lawfully on 23 August 2016. The possession order was set aside in 2019. The application for relief from forfeiture was not made until 10 March 2020. The subsection provides a six-month time limit which I am not empowered to disapply or enlarge. Even if I were so empowered, I would refuse an extension of time. There is nothing in the circumstances of the case to justify granting the very substantial extension that would be necessary.

76. Given that this would be the consequence if section 138(9A) was to be in play, Mr Sadiq eschews any reliance upon it. Attaching himself to the words I have highlighted above in bold (at [71]) he submits that there never has been satisfaction of the precondition of "the making of the order under subsection (3)". His case is that the Order made in July 2016 was manifestly not an order made under section 138(3) and, even it is was, it cannot operate for section 138(9A) purposes because it has been set aside.

77. Accordingly, he submits that time under section 138(9A) has yet to start running and can only potentially start to run after I have made the order under section 138(3) that he contends I am obliged to make. I have already rejected his argument in that respect. It follows that, if section 138(9A) had potential application in this case at all, it is too late

to invoke it. The scenario in which it would now be triggered afresh, is not one I am prepared to accept is available to Mr Sadiq's client.

78. It follows that for the purposes of Issues 4 and 5, the counterclaim for relief from forfeiture by operation of section 138 and/or section 139 fails because:

    a. there was no possession order made which could trigger the automatic relief provisions in section 138(3) and none will now be made;

    b. the provisions of section 138(9A) are not applicable in the absence of an order made under section 138(3) and (even if the Order of July 2016 was such an Order, the application in respect of it is out of time); and

    c. the provisions of section 139(2) are not available, because the application to the county court for relief was made long outside the six-month period following re-entry in August 2016.

79. Having reached those clear conclusions on the substantive matters raised by Issues 4 and 5, I need not set out separately each of the sub-issues of which they are determinative.

Issues 6 and 7: damages for unjust enrichment

80. The decisions set about above, taken together with the admissions that the exercise of the right to re-enter for breach was not waived and that re-entry was lawful, put paid to any claim for damages for unjust enrichment. Mr Golding did precisely what the lease permitted him to do in precisely the circumstances it addressed. The statutory qualifications on the exercise of his rights were either all addressed (see [29] above) or of no application (see [43] above). There was nothing 'unjust' about what occurred at all.

81. Indeed, the pleaded case for Ms Martin was that Mr Golding had been "unjustly enriched by the possession order".[19] For the reasons I have explained, no enrichment flowed from the possession claim or from the possession order. Such enrichment as Mr Golding achieved arose from his lawful exercise of his right to re-enter an empty flat on breach of the lease after having complied with all lawful pre-requisites.

82. Nothing would be gained by my embarking on an exercise of determining what (if any) damages Ms Martin might have recovered on her unjust enrichment counterclaim if it had succeeded.

[19] Counterclaim at [25]

Conclusion

83. For the reasons set out above, a possession order is not now made in this claim. The claimant has long since lawfully recovered possession by re-entry and ended the lease. The application for relief from forfeiture was made too late. The counterclaim for damages for unjust enrichment fails.

84. I trust that the parties will be able to agree the terms of a minute of order to give effect to this judgment and that consequential matters can be agreed. If so, attendance by their advocates at the handing down is excused. If not, I shall hear brief submissions based on proposed draft orders when judgment is handed down.

85. The endnote to the final chapter (see [1]) above) in this cautionary tale must be that a non-resident and absentee leaseholder who provides no correspondence address other than that of the property itself must either (a) make proper arrangements for forwarding or diverting the mail addressed to the premises or (b) entrust the task of 'keeping an eye' on their property to persons who are actually committed to that task.

HHJ Luba QC

25 January 2022