IN THE MATTER OF BANK OF CREDIT AND COMMERCE (GIBRALTAR) LIMITED

SUPREME COURT (Kneller, C.J.): November 19th, 1993

Landlord and Tenant—breach of covenant—waiver—landlord may, by conduct, waive breach consisting of liquidation of tenant company

Landlord and Tenant—breach of covenant—forfeiture—when breach is liquidation of tenant company, court may refuse landlord possession if he prevents liquidators from realizing lease as asset by refusing to co-operate in rent review and dissuading potential assignees

Companies—compulsory winding up—disclaimer of onerous property—court may further extend time allowed by Companies Ordinance, s.244 to disclaim lease if landlord obstructing liquidators' sale of lease—to balance landlord's right to deal with property and liquidators' duty to recover assets

The applicant applied for an order for possession of a leasehold property occupied by the respondent bank.

The bank leased its premises from the applicant landlord. It refused to pay the new rent demanded by the landlord under the rent review clause in the lease, instead continuing to pay at the old rate. The landlord accepted this for six months, but refused to agree to the revised sum negotiated by the parties' valuers.

An order was made for the winding up of the bank. The landlord subsequently returned the liquidators' cheques for further rent and gave them notice under s.244(4) of the Companies Ordinance, calling on them to decide within 28 days whether to disclaim the lease, as they were entitled to do under s.244(1). The liquidators ignored the notice and obtained a six-month extension of time in which to disclaim, since they were attempting to sell the lease to a building society for the benefit of the bank's creditors.

The landlord applied for leave to re-enter the premises and terminate the lease in accordance with a term of the lease, for payment of the arrears of rent at the original level, plus rates, and for an order that those payments and its own costs should be deemed expenses properly incurred in realizing the assets of the bank (and therefore payable from the bank's assets in priority to remuneration of the liquidators).

The bank obtained a further extension of time, and agreed to disclose to the landlord the identity of the assignee on condition that it would not be approached. The landlord immediately contacted the building society

and informed it that the bank had no interest to assign. The bank then sought a declaration that the landlord should not unreasonably withhold its consent to the assignment of the lease to the building society and that the premium payable to the landlord under s.69 of the Landlord and Tenant Ordinance be limited to the equivalent of one year's rent.

The landlord submitted that (a) it was entitled to possession under the terms of the lease, since the bank was in continuing breach of covenant through its insolvency, and the landlord had not waived that breach; (b) under s.4(2) of the Land Law and Conveyancing Ordinance, the bank could only claim relief against forfeiture within a year of the winding-up petition; (c) the extensions of time in which to disclaim the lease had been improperly granted, since the 28-day period specified in the Companies Ordinance s.244(4) had already expired and the court had no power to grant a further extension; (d) the sale of the lease to a building society would involve a change of user and the liquidators would have to pay up to the equivalent of two years' rent to obtain the landlord's consent under s.69 of the Landlord and Tenant Ordinance; and (e) the bank continued to be liable for rent.

The bank submitted in reply that (a) the landlord was not entitled to possession, since he had not obtained the court's leave under s.165 of the Companies Ordinance to bring forfeiture proceedings following the winding-up order; (b) the landlord had deliberately stalled progress on the rent review, which had been due for many months and ought to have been completed before the liquidation; (c) the landlord had waived its right to forfeit the lease by (i) accepting rent following the winding-up order, and (ii) giving notice to disclaim, since the lease had been affirmed in the absence of a reply within 28 days; (d) the court had properly granted a second extension of time, since the landlord had suffered no loss, and had continued to prevent the sale of the lease from progressing after the first extension; and (e) there would be no change of user in the assignment of the lease to a building society, and the lease specified that one year's rent was payable for the landlord's consent to assignment.

Held, striking out the summons for forfeiture and possession:

(1) Since the lease contained a provision for re-entry and termination of the lease upon the tenant's liquidation, the landlord could apply in the winding-up proceedings for an order for forfeiture and possession. However, the present application would be struck out, since under s.165 of the Companies Ordinance, the landlord had to first obtain the leave of the court to apply, even though the proceedings were not separate from the winding up. In any event, possession would only have been granted if there were no defence to the application, and the landlord had, by its conduct, waived its right to forfeit the lease. It had obstructed the bank's liquidators in their task by refusing to join in the rent review and attempting to dissuade the potential assignee of the lease from purchasing it. Furthermore, it had accepted rent at the pre-review rate after the breach and been willing to accept the premium for assignment of the lease (page 247, lines 12–24; lines 32–38).

(2) The court had had a discretion to extend the time available under s.244 of the Companies Ordinance in which the bank could disclaim the lease. The discretion was not limited to a single extension. The landlord had not obtained leave to serve the notice. Balancing the landlord's right to deal with its property and the duty of the liquidators to assist the court in recovering the bank's assets for distribution to its creditors, the court had granted a second extension on the basis of the willing co-operation shown by the liquidators in contrast to the obstructive stance adopted by the landlord (page 245, lines 10–27).

(3) The use of the premises by the building society as assignee would not constitute a change of use requiring the payment to the landlord of two years' rent under s.69 of the Landlord and Tenant Ordinance. The premium of one year's rent was set out in the lease. The court would give a declaration that it would be unreasonable for the landlord to refuse to consent to the assignment, and the costs of this application and that for the further extension of time would be met by the landlord (page 247, lines 25–31).

Cases cited:

(1) *Blue Jeans Sales Ltd., In re*, [1979] 1 W.L.R. 362; [1979] 1 All E.R. 641.
(2) *Civil Service Co-op. Socy. Ltd.* v. *McGrigor's Trustee*, [1923] 2 Ch. 347; (1923), 129 L.T. 788.
(3) *Evans* v. *Enever*, [1920] 2 K.B. 315; (1920), 89 L.J.K.B. 845.
(4) *General Share & Trust Co.* v. *Wetley Brick & Pottery Co.* (1882), 20 Ch. D. 260; *sub nom. In re Wetley Brick & Pottery Co.*, 30 W.R. 445, applied.
(5) *Horsey Estate Ltd.* v. *Steiger*, [1899] 2 Q.B. 79; (1899), 68 L.J.Q.B. 743.
(6) *National Jazz Centre Ltd., Re*, [1988] 2 E.G.L.R. 57, applied.
(7) *Oak Pits Colliery Co., In re* (1882), 21 Ch. D. 322; 51 L.J. Ch. 768.

Legislation construed:

Companies Ordinance (1984 Edition), s.163(2): The relevant terms of this sub-section are set out at page 240, lines 1–3.
s.165: The relevant terms of this section are set out at page 240, lines 5–8.
s.244(1): "Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the

commencement of the winding up or such extended period as may be allowed by the court, disclaim the property."

(4): "The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the court, given notice to the applicant that he intends to apply to the court for leave to disclaim, and, in the case of a contract, if the liquidator, after such an application as aforesaid, does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it."

Land Law and Conveyancing Ordinance (1984 Edition), s.4(2): The relevant terms of this sub-section are set out at page 240, lines 34–38.

Landlord and Tenant Ordinance (1984 Edition), s.69(1):

"…[I]t shall be a condition of every tenancy to which this Part applies that—

(*a*) the tenant may not assign his interest under the tenancy without the prior written consent of the landlord; and

(*b*) the consent of the landlord to the assignment shall not be unreasonably withheld."

s.69(2) "The landlord—

(*a*) may withhold his consent to the assignment of the tenant's interest where the assignee does not intend to carry on in the holding the same or a similar kind of business to that carried on by the assignor in the holding; and

(*b*) may as a condition of consenting to an assignment specified in paragraph (*a*), charge a premium not exceeding the equivalent of 2 years' rent at the annual rental payable immediately before the date of the assignment."

Companies (Winding-up) Rules 1929 (S.R. & O. No. 612/L.N. 16), r.73: The relevant terms of this rule are set out at page 241, lines 41–43.

r.192: The relevant terms of this rule are set out at page 241, lines 13–16.

Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c.41), s.14(6): The relevant terms of this sub-section are set out at page 240, lines 27–28.

L.W.G.J. Culatto for the landlord;
D.J.V. Dumas and *R. Ward* for the liquidators.

KNELLER, C.J.: Crossgates Ltd. ("Crossgates") is the freehold owner of the premises known as 20–22 Main St., Gibraltar. The Bank of Credit and Commerce (Gibraltar) Ltd. ("the bank") holds them upon a 20-year full repairing and insurance lease from July 1st, 1986. 45

The rent up to June 30th, 1990 was £53,000 a year, payable by equal quarterly instalments. There was supposed to be a rent review on July 1st, 1990 and Crossgates's valuer, Mr. Frances, thought it should be raised to £74,000 a year, but the bank refused to agree to pay it. Instead, it paid rent at the old rate up to the end of 1991.

The bank was ordered to be wound up by this court on January 14th, 1992. The joint liquidators sent Crossgates two cheques for the rent at the unrevised rate. The first was for £39,750, for the period from January 1st to September 30th, 1992 and the second for £13,250, for the period beginning on October 1st, 1992. Crossgates returned them on the grounds that it elected to forfeit the lease under cl. 4(1) of the lease, whereby Crossgates could re-enter the premises and thereupon the term created by the lease would be absolutely determined if, among other events, the bank was wound up compulsorily or voluntarily. Crossgates wants the premises back but for what purpose has not been revealed.

The provisional liquidators of the bank were appointed on July 6th, 1991 and took possession of the premises. At first, according to Crossgates, they used the premises for the provisional winding-up work but in early November 1992 they were using them as a store for furniture and office equipment belonging to the bank from those premises and its other premises at 153 Main St., which the joint liquidators had emptied.

Crossgates gave the liquidators notice on June 24th, 1992 to apply to the court within the next 28 days to disclaim the lease. The liquidators did not reply to this notice. The joint liquidators obtained an order *ex parte* from Alcantara, A.J. on July 2nd, 1992, extending the time for them to disclaim the lease by six months up to January 5th, 1993. The time for doing so was due to expire on July 5th, 1992 because that was 12 months after the date of the winding-up order.

Crossgates considers that the affidavit in support of the joint liquidators' application to the learned judge was defective because it did not present the full facts. The affidavit named the joint liquidators, recorded the date of the winding-up order and cited the effect of s.244 of the Companies Ordinance. Then its deponent added that the liquidators had been negotiating the sale of the lease with a number of interested parties and they needed up to another year to complete them and Crossgates had been kept in touch with their efforts. According to the joint liquidators, if the time to disclaim were not extended, undue prejudice to the bank's creditors would occur, because they would not have the proceeds of sale distributed among the creditors.

The liquidators admit that there was no reference in that affidavit to Crossgates's notice of June 24th, 1992 calling on the liquidators to apply to the court for leave to disclaim, or to the bank's failure to reply to it or act upon it or have the 28 days' time extended, but Alcantara, A.J.'s attention was drawn to the notice. Crossgates's view is that the judge's order has no effect because the bank was in liquidation and thus in breach

of the covenant. The joint liquidators point out that Crossgates did not appeal against Alcantara, A.J.'s order extending the time.

Crossgates also asserts that the joint liquidators have not maintained the premises or repaired them, so the bank is in breach of covenants to maintain and repair them.

Crossgates asks for orders (i) for leave to enter the premises and determine the lease; (ii) that the liquidators pay it £44,166.70 for the period up to October 30th, 1992 and £13,250 a quarter until possession is delivered up (all as rent and mesne profits, which ignores any increase under the rent review); (iii) that the liquidators pay the Government of Gibraltar all rates due and payable for the occupation of the premises until possession; and (iv) that all those payments are to be deemed an expense properly incurred in preserving, realizing or getting in the assets of the bank. Crossgates's application was by summons in chambers dated September 10th, 1992 and it was opposed by the joint liquidators.

Continuing with the chronology of this matter, we come upon the joint liquidators' summons in chambers of December 3rd, 1992 asking the court to extend the time again for them to disclaim the lease and to order Crossgates to continue with the determination of the rent review and restrain it from making any other move in connection with the premises without the leave of the court.

The joint liquidators' account of the background to this litigation is as follows: The bank had to leave its former premises in 153 Main Street in 1984, so it took a lease of the premises, which consisted of a derelict arcade of 851 sq. ft. with a patio on the ground floor, occupied by a restaurant and "a taker of small deposits," and an abandoned room on the first floor. (Crossgates's valuer says it was occupied by the restaurant and the Metropolitan Bank—which is a grand name for "a taker of small deposits").

The bank developed the building to an area of 3,000 sq. ft. at its own expense of £300,000 (and in addition paid the rent for it), and in return was granted a 21-year lease with an unusually wide user clause and an extremely favourable rent review clause. The premises could not be used for any gaming, illegal or immoral purpose, or as a restaurant because there was one there already—"Paddington's." It became a very valuable property to assign.

The annual review of the ground rent was to be on each fourth anniversary of the beginning of the lease. The bank's valuer, Mr. Jack Wright, proposed the figure of £47,500 and the counter-proposal was £90,000, which the bank rejected because it was based on the developed and not the derelict state of the premises. The user of the premises as a bank also had to be ignored according to the liquidators. The £90,000 a year demand came down to £74,000 on May 9th, 1991. The parties' valuers met on June 21st, 1991 and the sum of £60,000 was mentioned but Crossgates's agreement had to be sought.

The bank went into liquidation shortly afterwards. Crossgates did not confirm that the offer of £60,000 was agreed but accepted the old rent up to the end of 1991 and rejected it thereafter for reasons which are not entirely clear.

Now Crossgates will not continue the negotiations for the reviewed rent. It will not agree to the appointment of an independent expert by the President of the Royal Institute of Chartered Surveyors, which is provided for by cl. 5(2) of the lease. Crossgates just wants an order for forfeiture of the lease. Mr. Cherry, the expert, determined that the proper rent was £51,000 a year, which is less than the current rent of £53,000, so according to the lease the proper rent is £53,000. The valuers for the bank and Crossgates met and £60,000 was considered and the landlord's valuer was asked to find out if that was acceptable but he did not return any answer.

The importance of the rent review includes the need for the liquidators to make a decision as to whether the lease should be adopted or disclaimed. The prospective purchaser must know what the annual rent payable from July 1990 to the end of the term is. The old rent has been tendered because, the liquidators say, until the review rent is determined, that is the correct one.

The lease of the bank's premises is the largest remaining asset in the liquidation and the liquidators went to sell it. There are 14 years of it left and the user and rent review clause tempt many possible purchasers. However, none of them will buy it until the rent review has been completed.

The outgoings on the premises including insurance, maintenance, general rates and rent cost £20,000 per quarter, which the liquidators continue to pay. Meanwhile, the premises have been cleaned, repaired and maintained since the bank went into liquidation and these expenses put down to costs in the liquidation. The rates have been paid.

The premises are not being used and have not been used as a store because the liquidators could not justify this and the Committee of Inspection would not approve of that use. The usual banking and office furniture is in it still because a potential purchaser wants to purchase it so it would be unreasonable to move it. Seventy-seven unclaimed unopened safety deposit boxes are there. So is a fire-proof safe on the first floor with the bank's magnetic records of banking transactions. All the rest of the bank's property is in other premises in Rodger's Rd.

There were no decisions of any Gibraltar court cited and I have found none. A summary of the UK authorities follows.

1. A right to re-enter clearly accrues to a landlord on the making of a winding-up order if the lease contains a power to do so in the event that the lessee company should be wound up voluntarily or by compulsion: see *General Share & Trust Co.* v. *Wetley Brick & Pottery Co.* (4) (20 Ch. D. at 267). The property is under the control of the court and the landlord can only be kept out by the lawful act of the tenant.

2. "The winding-up of a company by the court [is] deemed to commence at the time of the presentation of the petition for the winding up": s.163(2) of the Companies Ordinance. So here it commenced on July 6th, 1991.

3. "When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such conditions as the court may impose": s.165 (see also ss. 87 and 163 of the Companies Act 1862).

4. The proper course for the landlord seeking possession by forfeiture is to apply in the winding-up proceedings. It is not a separate action, so no leave is required: see *General Share & Trust Co.* v. *Wetley Brick & Pottery Co.* (4); and *In re Blue Jeans Sales Ltd*. (1). The court is not justified in making such an order except in cases where there appears to be no defence to the claim for forfeiture of the lease and an order for possession: see *Re National Jazz Centre Ltd.* (6) ([1988] 2 E.G.L.R. at 58).

5. The liquidation of the bank is equivalent to a bankruptcy within s.14(6)(i) of the Conveyancing and Law of Property Act 1881, even if it is simply for the purpose of reconstructing the company and increasing its capital and not because it cannot pay its debts: see *Horsey Estate Ltd.* v. *Steiger* (5) ([1899] 2 Q.B. at 91).

6. Restrictions on and relief against forfeiture are the subject of the provisions of s.14 of the Conveyancing and Law of Property Act 1881. Generally, the landlord must give the tenant notice of the latter's breach(es) of covenants before he brings an action for ejectment. There are fetters on the right of re-entry. The section "does not extend … to a condition for forfeiture on the bankruptcy of the lessee…": see sub-s. (6)(i). There are no fetters on that right.

7. The Conveyancing and Law of Property Act 1881 is applied to Gibraltar by the English Law (Application) Ordinance.

8. Eleven years later, s.2(2) of the Conveyancing and Law of Property Act 1892 applied s.14(6) of the Conveyancing and Law of Property Act 1881 "to a condition for forfeiture on bankruptcy of the lessee … only after the expiration of one year from the date of the bankruptcy … and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, subsection (6) shall cease to be applicable thereto."

9. That change was reflected in s.2(2) of the Conveyancing and Law of Property Ordinance of 1895 and repeated in s.4(2) of the Land Law and Conveyancing Ordinance.

10. Thus, the landlord must give notice of the lessee's breach and the landlord's intention to apply for ejectment within one year of the winding-up order, and the liquidator must apply for relief within that year if it has not sold the lease or else the liquidator has no right to relief from

forfeiture: see *Civil Service Co-op. Socy*. v. *McGrigor's Trustee* (2) ([1923] 2 Ch. at 355, *per* Russell, J.).

11. The liquidator of a company, even if he has tried to sell the company's lease of premises may, with the leave of the court, disclaim in writing the lease at any time within 12 months after the date of the presentation of the petition. He will not be entitled to do so if he has received a written application from a person interested in the lease requiring him to decide whether he will or will not disclaim and he does not do so within 28 days after he receives the application or any further period allowed by the court. Such default means the company has adopted the lease: see s.244(4) of the Ordinance.

12. When it comes to payment of the landlord's costs of its application, rent due and mesne profits, if they are (a) "expenses properly incurred [by the liquidators] in preserving realising or getting in the assets" of the company, or (b) "necessary disbursements of any Liquidator appointed in the winding-up by the court" then they are payable out of the bank's assets in priority to the remuneration of the liquidators or any person properly employed by them: see Companies (Winding-up) Rules, 1929, r.192(1).

13. When the liquidators keep the property for the purpose of advantageously disposing of it or when they continue to use it, it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full before any other debt or expense properly incurred by the liquidator for the same purpose: see *In re Oak Pits Colliery Co.* (7) (21 Ch. D. at 323).

Mr. Culatto, for Crossgates, put its case in this way:

The bank was to occupy these premises and pay rent for 20 years. Its liquidation does not affect the fact that it is still the tenant and it is bound to pay the rent. Nevertheless, under s.244 of the Companies Ordinance it is possible for the liquidators of the bank to disclaim the lease and then the landlord would no longer have the bank as its tenant. This is a statutory right but there are restrictions to it. The liquidator may disclaim with leave of the court at any time during 12 months after the winding up. Normally the liquidator would look for someone to buy the lease. Mr. Culatto was of the view that the court could only extend that 12-month period once. On the other hand, the landlord can force the liquidator to decide and to do so by speeding up the process. This is done under the same section—s.244 of the Companies Ordinance. The landlord asks the liquidator: "Are you going to disclaim?"

Applications to disclaim are covered by r.73 of the Companies (Winding-up) Rules 1929. The application "shall be by summons *ex parte*. Such summons shall be supported by an affidavit… On hearing the summons the Court shall give such directions as it sees fit," *e.g.* the landlord must be served and appear because the landlord may not want the liquidator to disclaim. If the bank was going into voluntary liquidation

that would be a breach of the covenant in the lease. Where the rent was guaranteed by parties with money and plenty of it, the landlord would lose the rent if the disclaimer were made.

Here, Crossgates gave the liquidator 28 days to disclaim or adopt the lease by its notice of June 26th, 1992, but the bank made no reply to that. There was no application for a further extension from the bank. Mr. Culatto submitted that Crossgates was entitled to challenge the liquidator to disclaim or adopt at any time, even during the extended time which the liquidator had obtained from the court. In his view, moreover, disclaimer in the circumstances of this case was irrelevant because Crossgates was entitled to forfeit the lease and to enter the premises once the bank had gone into liquidation and was thereby in breach of the covenant in the lease. This court could not give the company any relief and could only give Crossgates an order for possession.

Mr. Culatto announced that Crossgates would forgo the requirement for a rent review after the first four years and the increased rent.

Mr. Dumas, for the joint liquidators, began by saying that they sought an extension of time to disclaim and to have the landlord's application dismissed. Crossgates's application did not refer to the rent review issue which had begun as far back as January 1990. The rent review was not complete because the landlord's valuer, Mr. Brian Francis, did not return to the joint liquidators or the bank. Instead, Crossgates stonewalled. There were 14 years left of its lease and the liquidators were ready to assign it. First of all they asked for an order that the rent be reviewed and resolved before the assignment.

He asserted that the joint liquidators had 12 months to decide whether to forfeit or adopt the lease after the order for the winding up was made, together with any further time granted by the court. The court could extend the time more than once. Crossgates had waived the right to forfeiture by unequivocal conduct and statements. Crossgates was not the original landlord. It was Reliable Securities which assigned the freehold on December 24th, 1987 to Warrington, and then Warrington to Crossgates. During August 1990, the premises at that time were in a derelict arcade. The bank agreed to refurbish them and on July 1st, 1986, re-leased them for 20 years.

The bank carried out the reconstruction work costing £300,000 with the express agreement that the bank would then take that lease, Mr. Dumas said. Mr. Francis took this into account when he should not have done. The valuers, Mr. Wright and Mr. Francis, negotiated the rent for it and Mr. Francis took into account things that he ought not to have done. They found that they were working on different plans and using different methods, such as the overall and zoning methods. The rent ought to have been fixed long before the bank went into liquidation. It was the landlord who had asked for this rent review and had not followed it up, probably because the landlord had changed from Warrington to Crossgates. At any

rate, the rent review matter had been outstanding for 17 months by the middle of December 1992. The landlord had accepted the old rent up to the end of 1992.

According to Mr. Dumas, the premises constitute the largest asset in the winding up and there was a potential customer ready to take the assignment when the rent review was concluded. No purchaser would take it until that was decided. The potential purchaser did not want to turn it into a restaurant but into premises for a deposit-taking building society. Crossgates was making offers to re-purchase the premises at one point but the joint liquidators, in their duty to the court and the creditors after that, were trying to sell the lease. They had no help from the landlords.

On June 23rd, 1992 the joint liquidators applied to the court for an extension of the time in which to disclaim. On July 2nd, 1992, the application was rightly made to the court *ex parte* and it was granted by Alcantara, A.J. Crossgates could not pre-empt that by notice to the bank asking them whether they were going to disclaim or adopt. They served the notice to put pressure on the liquidators. Anyway, this in effect affirmed the tenancy. If the joint liquidators did not disclaim the lease, Mr. Dumas said, then it belonged to them. Service of such a notice was a waiver of the right to forfeiture. When it served the notice, Crossgates became the architect of its own misfortune. There was no disclaimer within 28 days of the notice so the bank had adopted the lease. The landlords knew this but still say that they are entitled to it. The liquidators had refused forfeiture for just over three years and this was their last stand.

The assignment of the lease would be to the benefit of Crossgates, Mr. Dumas said, but they had dragged along the matter in order to get the best deal from the bank by forcing it into a corner. The issue of the notice was inexplicable. Some time at the end of July 1992, Crossgates told the bank that it should apply to the court for forfeiture and possession for the first time.

Whether or not to extend the time for disclaimer once more is a matter for the court to decide in the exercise of its discretion under s.244(4) of the Companies Ordinance. The court had to weigh in the balance the right of Crossgates to deal with its own property, these premises, and the court's duty to help the liquidators recover and distribute the assets of the bank. The joint liquidators asked for 30–60 days extra.

The liquidators' application for this extension of time to disclaim was, in Mr. Dumas's words, not a fanciful visit to nowhere or a waste of time. Crossgates had not put any evidence forward to indicate that it had or might have suffered any loss, whereas the liquidators had indicated that they would if the order were not given. This is a matter for a companies court which deals with the orderly winding up of companies. Crossgates had not indicated that they had a client but simply asked who the joint

liquidators had, which they were prepared to reveal on terms. At the moment there was no one in the premises, but the joint liquidators had a willing assignee.

The joint liquidators had paid all the rent and, Mr. Dumas contended, really could not have a stronger case for extension. All the covenants had been strictly observed. If the order were made, the joint liquidators might recover some if not all of the £300,000 investment.

The first extension of time given by Alcantara, A.J. had been given for a stated purpose which was frustrated by the behaviour of Crossgates, which refused to co-operate and failed to take part in fixing the rent and considering the assignment.

Turning to Crossgates's application for leave to enter and for the rent and mean profits due to be paid, Mr. Dumas pointed out that Crossgates needed the leave of this court under s.165 of the Companies Ordinance, and had neglected to ask for that leave. The court was entitled to impose terms. Crossgates was wrong in thinking that leave would be given as of right, and therefore failed to ask for it. So its application should be struck out with costs. It acknowledged that it ought to have sought leave in a letter dated November 25th, 1992. The basis for having this rule is that such applications should be screened and the court given an opportunity to consider the position of the parties.

In answer to a question from the court as to whether or not Crossgates was entitled to its costs if its application were successful, Mr. Dumas, for the joint liquidators, submitted that it was not, because it had come to the court with half the information required. Furthermore, it depended on whether the liquidators continued to occupy the premises to collect the assets.

In reply to all this, Mr. Culatto said that the joint liquidators had made a mistake when they assumed that Crossgates wanted a good tenant because it might be that Crossgates wanted the lease for itself or someone other than the tenant which the liquidators were offering. This is very much a matter for Crossgates's own decision. Simply put, the bank was being wound up and that gave rise to breach of covenant, and in fact it was a continuing breach. So all the submissions of Mr. Dumas were irrelevant. There was a right to forfeiture.

The acts of Crossgates were insufficient to amount to a waiver for continuing breach. Crossgates took out a summons on September 10th, 1992 for forfeiture and there was no waiver after that. Crossgates had decided to ask for forfeiture. There may have been negotiations between the parties but winding up constituted a continuing breach and the landlords could come to the court and ask for the order they now sought.

According to Mr. Culatto, the change from a high street bank's use of the premises to that by a deposit taker was a material change and therefore Crossgates could refuse to agree to the assignment under s.69(2) of the Landlord and Tenant Ordinance.

Crossgates maintained that the joint liquidators should cut their losses now and yield up the premises. The assignment would yield them no profit, since they would have to pay two years' rent as a premium for the assignment. What the court had to take into account when deciding whether to allow or disallow a liquidator's application to disclaim was the injury suffered by the lessors who are entitled to appear, hear the joint liquidators, and not accept a high street bank as a potential assignee. Acceptance of rent after bankruptcy did not constitute a waiver: see *Evans* v. *Enever* (3).

I gave the joint liquidators a further 60 days from the date of the order and adjourned the application by Crossgates and other orders sought by the joint liquidators and gave each party liberty to apply.

My reasons for doing so were that, in my view, the joint liquidators were not restricted by statute or authority from applying for an extension of time to disclaim more than once. The circumstances in this case, and the guidelines in the authorities cited, indicated that to extend the time was a matter for the discretion of the court and, like all discretions, it had to be exercised judicially, namely, without malice or whim.

The joint liquidators revealed that Crossgates had not obtained leave to serve its notice on them. Balancing the right of Crossgates to deal with its premises as it wished and the rights of the joint liquidators to assist the court in recovering as much of the bank's assets as it could for distribution amongst the creditors, together with the joint liquidators' prospective purchaser, their readiness to give Crossgates the details of the purchaser and the stance adopted by Crossgates in the run up to these cross-summonses led to my exercise of this discretion in favour of the joint liquidators.

The 60-day extension expired on June 6th, 1993 and the joint liquidators did not disclaim the lease because they found a building society willing to purchase the residue of the lease. They were willing to reveal which building society it was on terms that Crossgates did not approach the society. Later they did, and Crossgates wrote to the society to tell it that, in effect, the joint liquidators had no term of the lease to assign because the liquidation of the bank was a breach of a covenant in the lease and Crossgates was entitled to have the court's order for forfeiture and possession, arrears of rent and mesne profits. And so on and so forth.

The joint liquidators filed and served a summons dated April 30th, 1993 applying for a declaration that Crossgates could not reasonably withhold its consent to the assignment of the residue of the lease of the premises, or for an order that it consent and give effect to the assignment and, in any event, a declaration that the premium payable to Crossgates for the assignment should be the equivalent of the rent for one year or such sum as the court should see fit. They also asked for the costs of this April 1993 summons. The summons was expressed to be brought under the terms of s.69 of the Landlord and Tenant Ordinance.

The joint liquidators had no inkling of what the views of the court were on Crossgates's summons for forfeiture and possession, so they found this summons was necessary. Crossgates's counsel, Mr. Culatto, urged the court to deal with the issue of forfeiture because if it succeeded the joint liquidators had no residue of the lease to assign. No relief was possible because the liquidation of the bank was a breach of one of the covenants in the lease. Crossgates had not waived that breach. The joint liquidators were trespassers and that was the end of the matter. Crossgates awaited an order for possession, mesne profits and costs. Mr. Dumas, for the joint liquidators, reminded the court that they confidently expected the summons of Crossgates to be struck out because no leave had been given to bring it. Crossgates could not get the order for possession until the court made the order for forfeiture.

I decided, in the exercise of the court's discretion, to hear the joint liquidators' latest summons there and then. Much of the earlier submissions on forfeiture were necessarily repeated.

Mr. Dumas pointed out that the Landlord and Tenant Ordinance and authorities did not require the joint liquidators to reveal to whom or what they proposed to assign the residue of the lease, but Mr. Culatto pointed out, rightly in my view, that they must, since Crossgates as landlord had to consent to the assignment. Mr. Dumas described the joint liquidators' request for an undertaking that Crossgates would not approach the society as a reasonable one. Mr. Culatto justified Crossgates's refusal by reiterating its view that the society should know it was at risk of paying money for something the joint liquidators did not have to sell. Also, Crossgates as landlord must make enquiries about the proposed assignees' financial standing and its use of the premises.

The joint liquidators urged the court to declare that Crossgates's refusal to consent was unreasonable. The other conditions set out in s.69 of the Landlord and Tenant Ordinance had been met. The user would be in essence the same. The joint liquidators would pay Crossgates a premium of the rent for one year, which was specified in the lease, and not for the two years suggested in the Ordinance.

Mr. Culatto, in reply, maintained that in fact Crossgates did not need an order for forfeiture because it could re-enter peacefully, but an order made the re-entry a peaceful one. Moreover, a building society's activities are not those of a bank, so there would be a change of user and Crossgates was entitled to object on that score alone, to which Mr. Dumas pointed out that building societies these days act as bankers.

The joint liquidators had offered Crossgates all it was entitled to seek including payment of the prescribed premium.

Suppose the assignment failed: who or what would Crossgates turn to, asked Mr. Culatto. The joint liquidators said: "the building society."

There was much argument about the admissibility or otherwise of correspondence which Crossgates claimed was privileged because it was

sent on a "without prejudice" basis in an effort to reach settlement, but which the joint liquidators denied was privileged on that basis. Mr. Culatto said at one point that correspondence did not affect the issues in any event. I ruled that it was admissible and I agree that in the end nothing turns on it so I do not need to lengthen this matter with a review of the authorities cited and their effect in the circumstances of this case.

So far as Crossgates's summons for an order of forfeiture and for possession is concerned, I agree that it needed the leave of this court under s.165 of the Companies Ordinance to bring it even if it is an application in the winding-up proceedings and not a separate action. The court has to sift such applications. The summons must be struck out with costs.

If that is wrong, then on the authorities the court still has a discretion to exercise in applications for forfeiture on the grounds of the tenant going into liquidation. I would exercise it against Crossgates on the basis of their waiver of that breach, refusal to join in the rent review, refusal to give the undertaking not to contact the proposed assignee if the joint liquidators named him or it and their immediate maneouvre after the joint liquidators did so.

Add the fact that Crossgates agreed to accept the rent and mesne profits at the old rate and have been offered the premium prescribed in the lease, and to my mind it is clear that Crossgates should not have its order for forfeiture and possession. Even more so when the court must take into account its duty to assist the joint liquidators to recover what they can for the bank's creditors.

The use of the premises by the proposed assignee building society would not be a change of user. The premium of the rent for one year at the old rate was set out in the lease. The old rent was the result of Mr. Cherry's arbitration even if Crossgates would not take part in that exercise. I find that for Crossgates to refuse to agree to the assignment would be unreasonable and the joint liquidators should have the declarations they sought and the costs of their summons of April 30th, 1993.

Throughout these applications I have balanced the interest of the landlords to deal with their premises according to their wishes and the duty of the court to aid the joint liquidators to do their best for the bank's creditors.

I order that Crossgates's summons in chambers dated September 10th, 1992 be struck out with costs. The joint liquidators' time to disclaim was extended by 60 days from April 6th, 1993. Crossgates is to pay the costs of the joint liquidators' summons of December 3rd, 1992. The joint liquidators' application for a declaration by summons in chambers dated April 30th, 1993 is granted with costs.

Leave to appeal, if necessary by consent, is granted.

Orders accordingly.
