SAPPHIRE PROPERTIES LIMITED v. FIELDCOURT LIMITED and TRELLIS LIMITED

SUPREME COURT (Schofield, C.J.): July 10th, 1996

Landlord and Tenant—breach of covenant—forfeiture—relief against forfeiture—no relief under Conveyancing and Law of Property Act 1881, s.14(2) once order for possession made—equitable jurisdiction to grant relief to applicant in breach of covenant to pay rent, not other covenants, e.g. payment of rates

The applicants applied for relief against the forfeiture of a lease.

The respondents obtained judgment in default against the applicants in respect of arrears of rent and rates payable under covenants in the lease and were subsequently granted an order for possession. The applicants then applied for relief against forfeiture on the basis that the rent had, since judgment, been paid up to date and arrangements had been made for the payment of the rates arrears to the Government by instalments.

They submitted that even if, once the court had made an order for possession against them, they had lost their statutory right under the Conveyancing and Law of Property Act 1881, s.14(2) to apply for relief against forfeiture, such a right still existed in equity when forfeiture resulted from non-payment of rent or other specific payments including rates, as in this case.

The respondents submitted in reply that the applicants could not, following an order for possession obtained under the Rules of the Supreme Court, O.45, r.3(2), apply for relief against forfeiture either under the statute or in equity, since s.14(8) precluded that right where there was a breach of a covenant to pay rent, and any equitable jurisdiction which the court might have to grant relief in those circumstances did not extend to cover tenants in breach of a covenant to pay rates.

Held, dismissing the application:

(1) The court could not grant relief against forfeiture once an order for possession had been made, since the right to apply under s.14(2) of the Conveyancing and Law of Property Act 1881 was only available to a tenant in breach of a covenant to pay rates so long as the respondent was in the process of enforcing judgment and, by virtue of s.14(8) the right did not exist at all for a tenant in breach of a covenant to pay rent (page 309, line 37 – page 310, line 8; page 310, lines 35–41).

(2) Nor could the court grant relief under its inherent jurisdiction, since although that jurisdiction was exercisable in the case of the

breach of a covenant for payment of rent, it did not extend to granting relief in the case of failure to pay rates, which fell within the scope of the statutory scheme (page 310, line 41 – page 311, line 4; page 311, lines 26–36).

Cases cited:
(1) *Abbey Natl. Bldg. Socy*. v. *Maybeech*, [1985] Ch. 190; [1984] 3 All E.R. 262, not followed.
(2) *Billson* v. *Residential Apartments Ltd*., [1991] 3 All E.R. 265; on appeal, [1992] 1 A.C. 494; [1992] 1 All E.R. 141, *dicta* of Browne-Wilkinson, V.-C. applied.
(3) *Rogers* v. *Rice*, [1892] 2 Ch. 170; [1891–4] All E.R. Rep. 1181, applied.

Legislation construed:
Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c.41), s.14(1): The relevant terms of this sub-section are set out at page 309, lines 16–25.
s.14(2): The relevant terms of this sub-section are set out at page 309, lines 26–36.
s.14(8): "This section shall not affect the law relating to re-entry or forfeiture or relief in the case of non-payment of rent."

Rules of the Supreme Court, O.45, r.3(2):
"A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court. . . ."

L.J. Attias for the applicants;
H.K. Budhrani for the respondent.

SCHOFIELD, C.J.: By a sub-underlease dated May 24th, 1991, the plaintiff let to the two defendants premises known as Units l and 2 Watergardens, Block IV situated at Waterport, Gibraltar. The defendants covenanted, *inter alia*, to pay rent quarterly in advance and also all rates assessed upon the premises. By October 19th, 1995, the defendants were £4,561.50 in arrears with rent and owed a total of £8,000.79 in rates to the Government of Gibraltar in respect of the two units. The plaintiff, therefore, on that day filed this suit for possession of the premises and for judgment for the amount of rent and rates arrears and mesne profits. The writ was duly served and both defendants acknowledged service of the writ on October 26th, 1995.

The defendants took no further action and the plaintiff obtained against them judgment in default of defence on December 7th, 1995. On April 12th, 1996 the plaintiff filed a summons for a writ of possession of the premises pursuant to the Rules of the Supreme Court, O.45, r.3(2), which was heard and granted on May 20th, 1996.

There is no dispute that this writ was properly applied for and granted after the defendants had received due notice of the judgment being entered against them. The writ for possession was issued on May 29th, 1996 and possession of the premises was obtained on June 13th, 1996. The next day, June 14th, 1996 the defendants filed this summons for relief from forfeiture of the lease and seeking orders that the action be stayed. The defendants state that although they suffered temporary financial setbacks, the business which they operate from the premises is financially sound, that the rent has been paid up to date and that arrangements have been made with the Government for payment of the rates arrears by instalments. The plaintiff maintains that as it has already recovered possession of the premises, the court has no power to order relief from forfeiture.

By s.14 of the Conveyancing and Law of Property Act 1881, which applies to this jurisdiction by the English Law Application Ordinance—

> "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.
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> (2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

It was held by the English Court of Appeal in *Rogers* v. *Rice* (3) that once possession of a premises was recovered by a landlord the tenant was not entitled to relief under s.14(2). Lord Coleridge, C.J. said ([1891–4] All E.R. Rep. at 1138):

> "It seems to me quite clear that this is a case to which sub-s. (2) of s. 14 of the Conveyancing Act, 1881, does not apply. A proper notice under sub-s. (1) was given by the lessor, and he proceeded to enforce the forfeiture of the lease. The action was not hurried on and the judgment was not snapped, but the lessee took no steps to

prevent the forfeiture. The action proceeded to judgment and execution, so at least as regards recovery of possession. As to re-entry the 'proceeding' has been taken by the lessor, and has been successful. It is not a case of a lessor 'proceeding' to enforce his right. He has proceeded to enforce it and has enforced it, and it is now too late, therefore, for the lessee to seek relief. On the words of the Act alone, I should have said that it was perfectly clear that it was too late now to apply for relief against the forfeiture."

In the face of this authority Mr. Attias argues that although the defendants do not have a statutory entitlement to relief from forfeiture they may still look to equity. Very helpfully he has referred me to the later English Court of Appeal decision in *Billson* v. *Residential Apartments Ltd*. (2). In that case a tenant undertook alterations to the leased premises in breach of a covenant in the lease. The landlord served notice pursuant to s.146 of the Law and Property Act 1925, which is the English successor to s.14 of the Conveyancing Law of Property Act 1881, but which has not been applied to Gibraltar. The landlord peaceably, but without a court order, re-entered the vacant premises for a mere four hours before the tenants regained possession. The judge held that the claim by the landlord for forfeiture by re-entry was good and that he had no statutory or equitable jurisdiction to grant the tenants relief from forfeiture. By a majority the Court of Appeal upheld that decision and applied the decision in *Rogers* v. *Rice* (3).

In delivering the main judgment, Browne-Wilkinson,V.-C. (as he then was) considered whether the court could exercise an equitable jurisdiction to relieve against forfeiture despite the statutory power being unavailable. He said ([1991] 3 All E.R. at 276) that equity had formerly exercised such jurisdiction—

". . . in three categories of case, viz. (1) under the general principles of equity that the court will relieve a party from the consequences of fraud, accident or mistake; (2) in cases of non-payment of rent or other sums certain; (3) for wilful breach of covenants, other than covenants for the payment of rent, where adequate compensation can be made for the breach."

The Vice-Chancellor decided that relief may be granted in the first two categories, *i.e.* where fraud, accident or mistake arises in the context of a lease, and in cases of non-payment of rent in which instance relief against forfeiture had been "regulated by Parliament quite separately from relief for breach of other covenants." Indeed for our purposes, it may be noted that s.14 of the Conveyancing and Law of Property Act 1881 does not apply to covenants for non-payment of rent (see s.14(8)). However, the Vice-Chancellor held "that there is no longer any inherent [equitable] jurisdiction to relieve from forfeiture for wilful breach of covenant as between landlord and tenant save in relation to covenants for non-payment of rent."

I must say when I read the Vice-Chancellor's recitation of the three categories set out above, I considered whether in setting out category (ii) as "in cases of non-payment of rent or other sums certain" this category would include a breach of covenant to pay rates as in the present case. However, the Vice-Chancellor considered the case of *Abbey National Bldg. Socy.* v. *Maybeech Ltd*. (1). He had this to say ([1991] 3 All E.R. at 280):

> "The building society was mortgagee of a lease which, in addition to a covenant for the payment of rent, contained a covenant to pay maintenance contributions. The tenant was in arrears with the payment both of rent and the maintenance contributions. The landlord forfeited the lease and obtained possession under order of the court, without notifying the building society of what he was doing. When the building society discovered the position, it applied for relief against forfeiture under the inherent jurisdiction of the court. The judge granted such relief. It should be noted that, in relation to non-payment of contributions, relief could not be given under the provisions relating to non-payment of rent: relief could only be granted under s. 146. Since the landlord had obtained possession, such relief under s. 146 was no longer obtainable. Broadly, the judge held that the legislature had not 'stepped into' the whole area of relief against forfeiture for breach of tenants' covenants and that accordingly the old equitable jurisdiction to relieve from failure to pay a sum of money (which was admitted) could still be exercised. I will consider his reasoning further below."

It seems to me that for our purposes there is no distinction between a covenant for non-payment of rates as in the present case and a covenant for non-payment of maintenance contributions as in the *Maybeech* case. After a thorough review of that case, the Vice-Chancellor, with whom Parker, L.J. agreed, held that *Maybeech* was wrongly decided and that relief from forfeiture could not be granted in the circumstances of that case. Nicholls, L.J., who (as Nicholls, J.) had decided *Maybeech*, disagreed with the majority. However, I am bound, I feel, to follow the majority.

In so doing I hold that I cannot grant the relief prayed by the defendants and their summons is dismissed with costs to the plaintiff.

Application dismissed.
