[2001–02 Gib LR 197]

STAGNETTO PROPERTIES LIMITED v. ESSARDAS AND SONS LIMITED

COURT OF APPEAL (Neill, P., Glidewell and Stuart-Smith, JJ.A.): March 4th, 2002

Landlord and Tenant—renewal of tenancy—business premises—court may order new tenancy under Landlord and Tenant Ordinance on basis that tenant likely to pay future rent punctually notwithstanding unsatisfactory reasons given for past failure—appellate court may interfere with lower court's exercise of discretion only if erred in law or failed to considered material matter

The respondent applied to the Supreme Court for the grant of a new tenancy of business premises leased from the appellant.

The respondent had been in continuous possession of the premises since 1982 but paid no rent after 1985. By 1994 a substantial sum was in arrears but the appellant nevertheless agreed to grant a new lease provided that all the arrears were paid. A new five-year lease was drawn up, with the new rent payable monthly, and the respondent paid the arrears and the first three months' rent under the new lease. By the time it was executed, a further two months' rent was already due. The respondent failed to respond to the appellant's suggestion that he set up a banker's standing order for future payments and also failed to do so when it was suggested by his own solicitors. After that, arrears continued to mount and were invariably paid only after a demand from the appellant's solicitors but usually annually instead of monthly.

At no time did the appellant bring proceedings or seek to have the lease forfeited but in 2001 he served a notice to quit, whereupon the respondent immediately began paying on a monthly basis.

The respondent then commenced the present proceedings for the grant of a new tenancy, under the powers in the Landlord and Tenant Ordinance, which was opposed by the appellant. The respondent's explanation of how the arrears arose was (a) that the appellant did not have a system for rent collection as was usual with the other landlords in Gibraltar; (b) the cost of a standing order was prohibitive in relation to the rent; and (c) the periods between the demands for the outstanding rent had induced the belief that the appellant was content with the situation. Evidence was provided that the respondent was a member of a substantial group of companies which had sufficient resources to satisfy its obligations to all its creditors, including the landlord. The question

whether the tenant ought to be granted a new tenancy of the premises was ordered to be determined as a preliminary issue.

The Supreme Court (Pizzarello, A.J.) held that the appellant had failed to establish that the respondent ought not to be granted a new tenancy, since the respondent was able to pay its future rent and had undertaken to the court to set up a banker's standing order for monthly payments. It ordered that the appellant pay the respondent's costs.

On appeal, the appellant submitted that (a) the court had been wrong to find that the respondent was likely to pay future rent punctually, as this prediction was inconsistent with past conduct and there was no evidence of a change of attitude; and (b) the respondent's past conduct should have been taken into account in the award for costs.

Held, dismissing the main appeal and allowing the costs appeal:

(1) The Supreme Court was entitled to make the finding that the respondent was likely to pay the future rent punctually—and was already paying punctually—notwithstanding that the reasons given for the past failure were unsatisfactory. This was a matter for the judge's discretion and would only be interfered with on appeal if he had erred in law or failed to consider a material matter, which was not the case here (*per* Glidewell, J.A., at para. 29; paras. 38–39; *per* Neill, P., at para. 60; Stuart-Smith, J.A., dissenting, at paras. 55–57; para. 59).

(2) The Supreme Court had wrongly exercised its discretion in ordering the appellant to pay the respondent's costs. Although in ordinary civil cases costs normally followed the event, this case was one of many landlord and tenant cases in which it was appropriate to adopt a "no order as to costs" approach. The appellant had established, through the admission of the respondent's persistent delay in paying the rent, the necessary facts to oppose successfully the grant of a new tenancy. The respondent had therefore been obliged to take the appellant to court to persuade the court to exercise its discretion in its favour and it was incorrect in principle for the appellant to be penalized because the discretion was exercised against it. There would be no order for the costs of the preliminary issue (paras. 42–45; paras. 59–60).

Cases cited:

(1) *Betty's Cafes Ltd.* v. *Phillips Furnishing Stores Ltd.*, [1957] Ch. 67; [1957] 1 All E.R. 1, *dicta* of Birkett, L.J. considered.
(2) *Decca Navigator Co. Ltd.* v. *G.L.C.*, [1974] 1 W.L.R. 748; [1974] 1 All E.R. 1178, referred to.
(3) *Hurstfell Ltd.* v. *Leicester Square Property Co. Ltd.*, [1988] 2 E.G.L.R. 105, considered.
(4) *Lyons* v. *Central Comm. Properties Ltd.*, [1958] 1 W.L.R. 869; [1958] 2 All E.R. 767, *dicta* of Morris, L.J. considered.
(5) *Maya Ltd.* v. *Gibrealty Ltd.*, Supreme Ct., June 1st, 2001, unreported, referred to.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.77(1)(c): The relevant terms of this paragraph are set out at para. 5.

J.J. Neish, *Q.C.* for the appellant;
H.K. Budhrani, *Q.C.* for the respondent.

1 **GLIDEWELL, J.A.:** The appellant, Stagnetto Properties Ltd. is the owner of premises at 53A Irish Town, Gibraltar, which have for many years been occupied by Essardas & Sons Ltd. as a store for the purposes of its business. Most recently, that occupation has been by virtue of the statutory continuation of a lease of the premises dated December 22nd, 1994 by the landlord to the tenant.

2 On February 20th, 2001, the landlord gave notice in writing to the tenant terminating the tenancy on August 31st, 2001. The notice stated that the landlord would oppose an application for the grant of a new tenancy in view of the tenant's persistent delay in paying rent which had become due. On June 10th, 2001, the tenant applied to the Supreme Court for the grant of a new tenancy. On July 30th, 2001, the landlord gave notice that it intended to resist the claim on the ground set out in its notice to quit.

3 On August 28th, 2001, Schofield, C.J. ordered that the question whether the tenant ought to be granted a new tenancy of the premises should be tried and determined as a preliminary issue. That preliminary issue was duly heard before Pizzarello, A.J., who, in a judgment dated October 29th, 2001, concluded that the landlord had failed to establish to his satisfaction that the tenant ought not to be granted a new tenancy, and ordered the landlord to pay the tenant's costs of the determination of the preliminary issue.

4 The landlord now appeals to this court both against the judge's determination of the preliminary issue in the tenant's favour and against his order for costs.

The main appeal

5 The statutory regime governing this matter is contained in Part IV of the Landlord and Tenant Ordinance, which relates to business premises. The tenant's tenancy of the premises came within those provisions by virtue of the definition in s.38(1). The landlord's notice to quit was given in accordance with s.44, which amongst other matters required the landlord to state whether it would oppose an application to the court for a new tenancy, and if so, on which of the grounds specified in s.49 it would do so. Section 49(1) sets out five potential grounds on which a landlord may oppose the grant of a new tenancy, the ground relied on by the

landlord in this case being that set out in s.49(1)(b). Section 43(1) entitled the tenant to apply for a new tenancy. Section 77(1)(c) provides that, where a landlord has given a notice to terminate a tenancy under s.44 and the tenant has made an application for a new tenancy under s.43—

> "(c) . . . the effect of the notice or request would be to terminate the tenancy before the expiration of the period of 3 months beginning with the date on which the application is finally disposed of—
>
> the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of 3 months and not at any other time."

6 It is under this provision that the tenant's tenancy continues at present, since the final disposal of an application is defined in the Ordinance as including the decision on an appeal against any determination at first instance. The scheme and wording of the Ordinance are similar to those of Part II of the English Landlord and Tenant Act 1954.

7 The evidence before Pizzarello, A.J. consisted of a witness statement made on behalf of the tenant by Mr. Budhrani dated July 10th, 2001, to which were exhibited the lease and the relevant notices, an affidavit sworn by Mr. Stagnetto, a partner in the landlord's solicitors, on September 18th, 2001 and a further witness statement by Mr. Budhrani in reply dated September 10th, 2001, with further documents exhibited. There was no oral evidence and thus there is no dispute about the primary facts set out in the witness statements, affidavit and the exhibited documents. These facts can be summarized as follows.

8 The tenant has been in occupation of the premises continuously since a date not later than 1982. For some reason, which is not explained in the evidence, the tenant paid no rent after November 1985. By March 1994, the arrears of rent amounted to £12,510. The rent due up to December 31st, 1993 was at the rate of £140 per month. Despite these arrears, the landlord agreed to grant a new lease of the premises to the tenant, provided that the arrears were all paid. By March 4th, 1994, the terms of the new lease had been agreed between the parties and their solicitors. On June 27th, 1994, the tenant's solicitors sent to the landlord's solicitors a cheque for £13,110, being the amount of the arrears plus a further three months' rent to the end of June 1994, at the new agreed rate of £200 per month. A letter from the landlord's solicitors acknowledging the payment asked whether the tenant was willing to sign a standing order for payment of future rent. There was no answer to that question at that time.

9 The lease was finally executed on December 22nd, 1994. It was for a demise of the premises by the landlord to the tenant for five years from January 1st, 1994, at the rent for the first two years of £200 per month

payable on the last day of each month and thereafter at such rent as was agreed between the parties, or in default of agreement, assessed by a surveyor appointed in accordance with a procedure specified in the schedule to the lease. At the date when the lease was executed, the rent had been paid up to September 30th, 1994. In other words, a further two months' rent was already in arrears.

10 Thereafter, the arrears again mounted. The record of arrears and payments is as follows:

Date	Amount of arrears	Paid
March 4th, 1994	£12,510	
June 1994	£13,110 April, May, June 1994	23/6/94
September 1994	£600 July, August, September 1994	17/10/94
September 1995	£2,400 October 1994–September 1995	
January 1996	£3,000 October, November, December 1994 plus 1995	10/1/96
December 1996	£2,200 January–November 1996	13/12/96
December 1997	£2,600 December 1996–December 1997	
April 1998	£3,200 December 1996–March 1998	6/4/98
May 1999	£2,800 April 1998–May 1999	31/5/99
June 2000	£2,600 June 1999–June 2000	20/6/00
February 2001	£1,400 July 2000–January 2001	21/2/01

11 When the arrears were paid, this was invariably as the result of a letter requesting such payment from the landlord's solicitors. In a letter dated September 18th, 1995, the landlord's solicitors said: "I did suggest that payment should be made by banker's order and perhaps your clients could organize this in order to avoid these delays in the future." On

January 10th, 1996, Mr. Budhrani replied in a letter in which he said: "I have advised my client to either organize a banker's standing order or to ensure that they physically pay into your client's account, numbered 182 3455 at Barclays Bank, the rent due from month to month, so that arrears of the magnitude that have arisen are avoided in the future." Despite this, neither of these things happened.

12 December 31st, 1995 was the date at which the landlord could have sought a revised rent, but there was no agreement on this and the procedure for assessing a new rent was not followed. The rent, therefore, remained at £200 per month.

13 At no time did the landlord sue for arrears or seek to have the lease forfeited. On December 31st, 1998, the term of the lease expired and the landlord could at any time thereafter have served a notice to terminate the tenancy under s.44 of the Landlord and Tenant Ordinance, but it did not do so until the notice dated February 20th, 2001, which initiated these proceedings.

14 After the service of the notice to quit, the tenant's practice changed. Thereafter, up to the date of the hearing before the judge, the monthly rent due was paid within a few days of the end of the relevant month and occasionally even early, without demand or reminder on behalf of the landlord.

15 In his second witness statement, Mr. Budhrani sought to explain why his client allowed arrears to mount up as shown in the schedule above, in the following passages:

> "2. This was due to the fact that the landlord never put in place a system for the collection of rent as do other landlords in Gibraltar. All the other landlords of the several premises that I control by virtue of my directorship of various companies, either insert a provision in the lease requiring payment of rent by banker's standing order or collect the rent themselves or by their agents."

> "4. Although the landlord has through its solicitors suggested on one or two occasions that the rent be paid by banker's standing order, the amount proposed to be charged by our bankers for such payments has been quite prohibitive in relation to the rent. What is more, the period of time that the landlord has allowed to elapse between its various reminders as to outstanding rent has caused the tenant to believe—erroneously as it turns out—that the landlord is quite content to collect rent at such intervals in the knowledge that there would be no default on the part of the tenant as, indeed, there never has been throughout the tenant's lengthy occupation of the premises."

In para. 10, Mr. Budhrani said that all the other members of the group of companies, of which the tenant is a member, punctually pay the rent on the respective dates because there exist effective arrangements for the collection of rents. He added:

> ". . . In the circumstances, there can be no doubt in the landlord's mind that the tenant is well able to punctually pay the rent due from it to the landlord for the premises at 53A Irish Town.
>
> 11. In the event that this Honourable Court should see fit to order the grant of a new tenancy to the tenant, the tenant undertakes to execute a banker's standing order for the payment of the rent due to the landlord from month to month in order to ensure that there is no delay in the receipt of the rent by the landlord."

Mr. Budhrani also offered sureties for the future payment of rent.

16 We have been referred, as was the learned judge, to several authorities which deal with issues that arose under s.30 of the Landlord and Tenant Act 1954 (the equivalent of s.49 of the Gibraltar Ordinance) and to one case under the Ordinance itself. Unfortunately, none of these decisions is directly in point, but they give some guidance.

17 The first case was *Betty's Cafes Ltd.* v. *Phillips Furnishing Stores Ltd.* (1), a decision of the English Court of Appeal. This was a case under s.30(1)(f) of the 1954 Act, which raised the question whether the landlord had proved his intention to carry out substantial work of construction if a new lease were refused. The issue in the case was the correct date at which the matter should be considered—was it the date at which the notice to quit was given or the date of hearing? The decision is authority for the proposition that it is the date of hearing. Neither s.30(1)(f) of the 1954 Act nor s.49(1)(d) of the Gibraltar Ordinance, which is its equivalent, contain the words "ought not to be granted a new tenancy," which are to be found in sub-paras. (a), (b) and (c) of the sub-section. In other words, sub-para. (f) is concerned only with the question of fact whether the landlord did intend to reconstruct the premises. There is no question of the court having any discretion in the matter, as it undoubtedly has under paras. (a), (b) and (c).

18 However, in his judgment, Birkett, L.J. referred to s.30(1)(b) of the 1954 Act, in the following terms ([1957] Ch. at 82):

> "This again is a subsection which makes use of the words 'ought not.' This would seem to leave some discretion in the court which hears the application to decide whether the application ought or ought not to be granted. In practice, the court would look at the history of the payments and make its decision; but if the tenant had some very good reasons to explain delays, and very good grounds for assuring the court that the like situation would never arise again,

it seems difficult to say that the court could not listen to evidence to show how completely the situation had changed from the date of the notice to what it was at the date of the hearing, and that it was prevented from taking the evidence into account in considering whether the landlord had established to the satisfaction of the court that the court 'ought not' to grant the application."

19 The decision of the Court of Appeal in the *Betty's Cafes* case was the subject of a further appeal to the House of Lords, but I do not find anything in the speeches of their Lordships which assists us with the problem at present before us.

20 *Lyons* v. *Central Comm. Properties Ltd.* (4) was another decision of the Court of Appeal. In that case, the landlord opposed the tenant's application for a new tenancy on the ground in s.30(1)(a), namely, that the tenant "ought not to be granted a new tenancy" because of his breaches of his repairing obligations under the lease. At the time of the hearing before the judge of first instance, the property was still in disrepair, but the tenant advanced particular reasons why this was so and why the matter would be put right in the future. It will be seen that the case did involve consideration of the judge's discretion under the same words as those found in s.30(1)(b) and s.49(1)(b) of the Ordinance.

21 Morris, L.J. said ([1958] 1 W.L.R. at 876):

"[Counsel for the landlords] alternatively submitted that the discretion vested in the court is limited so that a court must only consider such matters as may be explanatory of past defaults, or may be of an exculpating nature in regard to past defaults, or may be indicative that in the future there will be good behaviour in regard to the honouring of obligations . . . I would hesitate to adopt any particular formula as being all embracing or which might be thought to be restrictive or definitive. I do not think that it is desirable to say more than that once a court has found the facts as regarding the tenant's past performances and behaviour and any special circumstances which exist, then, while remembering that it is the future that is being considered, in that the issue is whether the tenant should be refused a new tenancy for the future, the court has to ask itself whether it would be unfair to the landlord, having regard to the tenant's past performances and behaviour, if the tenant were to enjoy the advantage which the Act gives to him."

Ormrod, L.J. gave judgment to the same effect. Harman, J. regarded the judges' discretion as narrower, but this view has not been followed subsequently.

22 *Hurstfell Ltd.* v. *Leicester Square Property Co. Ltd.* (3) was a decision of the Court of Appeal in a case which did involve s.30(1)(b).

The tenant's business was in severe financial difficulties and arrears of rent mounted. The landlord frequently had to chase the tenant for payment and in two cases had to start proceedings before payment was made. Only after notice to quit was served was the rent paid promptly. The issue in the case was whether the evidence was enough to show that the arrears would not recur if a new tenancy were granted. The judge in the county court decided that it was and ordered the grant of a new tenancy. The Court of Appeal dismissed the appeal.

23 In his judgment, with which Taylor, L.J. agreed, Nicholls, L.J. said ([1988] 2 E.G.L.R. at 105):

> "Before the judge, counsel for the landlord accepted that the burden of persuading the court to refuse a new lease lay on the landlord. Counsel for the tenant, for his part, accepted that, whatever was the strict position about onus, the tenant was obliged in this case to explain the reasons for the past failures and to satisfy the court that, if a new lease were granted, there would be no recurrence of the late payments of rent.
>
> The judge's approach appears from a passage at p 7 of the transcript of his judgment where he said that counsel for the tenant urged upon him, with both lay and professional prognosis of the company's future,
>
> > 'that I may be satisfied that the landlord's fears of a repetition are, if not groundless, at least so unlikely to recur, as to justify me in saying in my discretion that I am prepared to refuse the landlord's request that a new lease should not be granted. In so doing I would of course be saying effectively that I accept the reasons advanced for past failures, and, on balance, consider there is sufficient evidence to justify me in holding that a recurrence is not just unlikely, but will not in fact occur.'"

24 That approach has not been challenged or criticized on behalf of the landlord. Indeed, it is in line with the approach spelt out by Birkett, L.J. in *Betty's Cafes Ltd.* v. *Phillips Furnishing Stores Ltd.* (1). Nicholls, L.J. then set out the passage from the judgment of Birkett, L.J. which I have quoted above.

25 *Maya Ltd.* v. *Gibrealty Ltd.* (5) was a decision of Schofield, C.J. in the Supreme Court of Gibraltar on June 1st, 2001. The learned Chief Justice followed the guidance in *Hurstfell* (3) and concluded in that case that the evidence did not satisfy him that the tenant would not fall into arrears in future if he granted a new lease. He therefore refused to do so.

26 In the present case, Pizzarello, A.J. quoted all the passages from the decisions of the English Court of Appeal which I have set out above and therefore clearly had them well in mind.

27 Mr. Budhrani has at all times accepted on behalf of his client that at the date of the service of the landlord's notice to quit, the tenant was guilty of persistent delay. Moreover, he did not argue with the proposition briefly and correctly expressed in *Woodfall's Law of Landlord & Tenant*, at para. 22–101.1, that "the fact that the tenant pays his rent punctually while proceedings are pending is not a powerful factor in his favour."

28 The question before Pizzarello, A.J. was therefore whether, despite the persistent arrears in the past, he should, in the exercise of his discretion, decide that the tenant ought to be granted a new tenancy.

29 This court is not in a position to form its own view of the matter and to substitute that view for that of the judge. We can only overturn the decision at which the judge arrived in the exercise of the discretion to which I have referred if he erred in law or failed properly to take into account a matter which he should have considered.

30 In his judgment, Pizzarello, A.J. quoted extensively from the authorities to which I have referred, including all passages I have set out above, he recited the facts and then summarized the respective arguments advanced by counsel for the parties.

31 In the court below, one, if not the, major argument of Mr. Stagnetto, Q.C. for the landlord was that in a case such as this, where the persistent failure to pay rent was not merely proved but admitted, the court ought to approach the exercise of its discretion in two stages. On the authorities, he submitted, the court had first to decide whether the tenant satisfactorily explained the reasons for his past failure to pay rent on time. If he did not, then it was unnecessary for the court to go to the second stage, namely, to consider whether if a new lease were granted there would be a recurrence of the past failure to pay on time. Mr. Stagnetto based this submission largely on the passage from the judgment of Nicholls, L.J. in *Hurstfell* (3), which I have cited earlier. The judge rejected this submission. He said that *Hurstfell* did not "support Mr. Stagnetto's stark dichotomy." In my opinion, the judge was correct in coming to this view. The authorities establish that, in exercising his discretion, a judge must consider both the reasons advanced by the tenant for his failure to pay rent on time and the likelihood that, if he is granted a new tenancy, he will not again fall into arrear. Clearly the less valid the reasons given by the tenant for late payment, the more difficult it will be for him then to persuade the court that he will pay his rent on time in future. In my view, however, the tenant is not to be barred from attempting this difficult task even if the reasons which he gives for his past failure are unsatisfactory. I too would reject Mr. Stagnetto's two-stage test, and it is noticeable that Mr. Neish, Q.C. did not advance his powerful argument in quite the same terms.

32 A more persuasive argument by Mr. Stagnetto, which Mr. Neish in effect repeated in this court, is that it is not sufficient for the tenant to

show that since it is a member of a substantial group of companies, it is well able to pay the rent when it falls due and thus can be expected to do so. The failure to pay on time in the past when the tenant was able to do so must, submits Mr. Neish, raise a real doubt as to whether it can be trusted in future not to allow arrears to mount again.

33 There were three reasons put forward by Mr. Budhrani on behalf of his client for the tenant's past failure to pay rent on time. First, "that the landlord's conduct was generous towards the tenant and seemed to the tenant not to have been too concerned about late payments and so the tenant was slack about payment on time" (see para. 15). Mr. Budhrani pointed out that despite the large arrears amounting to over seven years' rent which had arisen by 1994, the landlord was still willing to enter into a new lease, and thus sowed the seeds of the tenant's belief that the landlord was not too concerned about the timely payment of rent. The second reason was that the landlord never put in place a system for the collection of rents, which it was said that other landlords did, although it was not as a matter of law obliged to do so. The third reason was that in relation to the amount of the monthly rent, the cost charged by the tenant's bank for a banker's standing order was proportionately too expensive.

34 Of these reasons the judge said:

> "[L]ooking at this matter at the time of the hearing of the application, I do not think that the claimant has given a very good excuse for the non-payment of rent up to the time that notice to terminate was given. It is not for the reasons advanced by Mr. Stagnetto."

This brief passage in the judgment is somewhat enigmatic. The second sentence clearly means, in its context, that for the reasons advanced by Mr. Stagnetto, the tenant's explanation does not provide "a very good excuse" for the non-payment of rent. The learned judge did not, as he might have done, consider separately each of the reasons advanced by Mr. Budhrani and reach a decision about the validity of each in turn. The first reason advanced by Mr. Budhrani, that the landlord's conduct was "generous towards the tenant and seemed to the tenant not to have been too concerned about late payments and so the tenant was slack about payment on time," Mr. Stagnetto described as "a cheeky attempt to excuse himself by taking advantage of the landlord's tolerance." It appears that the judge accepted that as a fair description. Certainly, he did not go further and characterize the tenant's conduct as dishonest or deceitful.

35 At that stage of his judgment, the judge having concluded that the tenant had cheekily taken advantage of the landlord's tolerance and

having rejected the other explanations given for non-payment, had to ask himself the question whether, as the landlord had made it clear that it was no longer prepared to tolerate further delays by the tenant in payment of rent, he could be satisfied that, if a new lease were granted, the tenant would pay rent in the future punctually.

36 He then addressed this question and in para. 16 of his judgment he continued:

> "The fact is, however, that since that date [*i.e.* the date of the notice to quit] rent has been paid punctually or may be deemed to have been paid punctually, so the claimant is not in breach at the moment. Looking at the evidence presented to me—and I have not had the advantage of seeing the witnesses in cross-examination—it seems to me that the evidence advanced in the witness statement of Mr. Budhrani at paras. 8, 9 and 10 has not, despite the criticism levelled by counsel for the landlord, been substantially eroded."

37 The judge then summarized the contents of those paragraphs in the witness statement, which were to the effect that the claimant is a member of a substantial group of trading and investment holding companies which has sufficient resources to satisfy its obligations to all its creditors including the landlord. Mr. Budhrani named the other companies in the Essardas Group and said that they all paid their rents on their respective due dates because "there exist effective arrangements with their respective landlords for the collection of rent and all the said companies are up to date with the rates and utility charges due from them."

38 The judge expressed his conclusion at the beginning of para. 17 of his judgment as follows: "I am satisfied that the claimant is able to and will pay his future rent punctually and the landlord has not persuaded me that I ought not to grant a new tenancy." The first part of the sentence constituted a finding of fact, with which this court cannot properly interfere provided that there was material upon which it could be made, as there was. It follows that despite the difficulty created by the fact that the excuses given by the tenant for the late payment of rent in the past were not very good, the judge was able to satisfy himself on the evidence that in future the rents would be paid punctually. In my judgment, that was a conclusion to which he was entitled to come.

39 If I were deciding this case at first instance, I might well have done so by refusing to grant a new lease. But this court, as I have said, is not in the same position as the judge of first instance. Our task is to consider the judge's exercise of his discretion. Not without hesitation, I have reached the conclusion that the learned judge did not fall into any error of law or principle nor disregard any material matter in exercising his discretion as he did. I would therefore dismiss the main appeal.

The costs appeal

40 During the argument on costs, Mr. Budhrani relied on a letter he had written to the landlord's solicitors some two weeks before the hearing began, in which he emphasized the resources at his client's disposal, argued that the landlord could therefore be confident that in future rent would be paid on time and invited the landlord to withdraw its opposition to the grant of a new tenancy of the premises to avoid incurring the costs of the preliminary issue.

41 I assume that the judge took this letter into account when deciding to award the tenant its costs of the preliminary issue. He simply said: "I think costs must follow the event." I infer from this that he was following the normal, though not invariable, practice in civil litigation that costs should follow the event, reinforced by Mr. Budhrani's letter.

42 This also was a decision which the judge reached as a matter of discretion, but on this matter it is my view that he exercised his discretion on a wrong principle. This was not a normal piece of civil litigation, in which success for a party depends on findings of fact or an interpretation of documents in his favour.

43 At one time, it was thought that there should be a normal practice in proceedings between landlord and tenant that each side should pay its own costs. It was said by Lord Denning, M.R. in *Decca Navigator Co. Ltd*. v. *G.L.C.* (2) that this practice should no longer be followed generally. Nevertheless, the reasons for the adoption of a "no order as to costs" approach still apply in many landlord and tenant cases, distinguishing such proceedings from other civil litigation.

44 The present case is a good example of proceedings which fall into this category. The landlord proved—had an admission—of the facts necessary for him to successfully oppose the grant of a new tenancy—the persistent delay in paying rent. It was then for the tenant to persuade the court to exercise its discretion in its favour. In order to do this, it was obliged to go to court. Despite Mr. Budhrani's letter, the landlord was in my view wholly justified in arguing that the discretion should not be exercised in the tenant's favour because of its past conduct. I have no doubt that in such a situation the proper course for the court was to leave each party to pay its own costs, by making no order as to costs.

45 As I have said, the judge in making a costs order in favour of the tenant made an error in principle. I would allow the costs appeal, set aside the judge's order for costs and make no order as to the costs of the preliminary issue.

46 **STUART-SMITH, J.A.:** I gratefully accept the statement of facts set out in the judgment of Glidewell, J.A. There was no dispute that up to

the middle of 2001 (when the notice to quit was served by the landlord) the tenant had persistently delayed in paying its rent. The judge described the record as lamentable. Over a period of 84 months, rent was paid up to date on only eight occasions, and those were after the service of the notice to quit. As a rule, instead of being paid monthly, it was paid only yearly, and that only after a chasing letter from the landlord's solicitors.

47 Three reasons or explanations were put forward for this deplorable state of affairs. First, that the landlord's conduct towards the tenant was generous and seemed to the tenant not to have been too concerned about late payment. Secondly, that the landlord never put in place a system for the collection of rent, by appointing a rent collector. And thirdly, that payment by banker's order was disproportionately expensive for the monthly payments of £200. Mr. Stagnetto, who appeared for the landlord in the court below, severely criticized these reasons. The judge accepted these criticisms. He said at para. 16:

> "[L]ooking at this matter at the time of the hearing of the application, I do not think that the claimant has given a very good excuse for the non-payment of rent up to the time that notice to terminate was given. It is not for the reasons advanced by Mr. Stagnetto."

48 Indeed, it seems to me that the second and third reasons are quite untenable. And Mr. Budhrani, Q.C., who appeared for the tenant in this court, accepted that the first was not a good reason for non-payment of the rent, but he submitted that it was an explanation and that all the tenant was required to give was a genuine explanation, even if it was not an excuse or a good reason.

49 Nevertheless, the judge held that despite this inexcusable and persistent failure to pay the rent, in the exercise of his discretion the tenant was entitled to be granted a new lease. He rehearsed those paragraphs of Mr. Budhrani's witness statement which showed that the tenant is a member of a substantial group of companies, and had at all times been able to pay the rent and would continue to be able to do so. The judge then stated that he was satisfied "that the claimant is able to and will pay its future rents punctually and the landlord has not persuaded me that I ought not to grant a new tenancy." He added the suggestion that the landlord should include a provision in the new lease that the rent be paid by banker's order.

50 Mr. Neish, Q.C., on behalf of the appellant landlord, submits that there is an unjustified gap in the judge's reasoning. While the finding that the tenant is able to pay is a finding of fact; the finding that the tenant will pay the future rent, is not strictly a finding of fact but a prognostication as to the future or a forecast of future behaviour which can only be based on

past conduct; or if it is inconsistent with past conduct, as here, on evidence of a change of heart and attitude; and of that there is really none at all.

51 I take the law to be as stated in the judgment of Nicholls, L.J. in *Hurstfell Ltd.* v. *Leicester Square Property Co. Ltd.* (3) ([1988] 2 E.G.L.R. at 105):

> "Before the judge, counsel for the landlord accepted that the burden of persuading the court to refuse a new lease lay on the landlord. Counsel for the tenant, for his part, accepted that, whatever was the strict position about onus, the tenant was obliged in this case to explain the reasons for the past failures and to satisfy the court that, if a new lease were granted, there would be no recurrence of the late payments of rent.
>
> The judge's approach appears from a passage at p 7 of the transcript of his judgment where he said that counsel for the tenant urged upon him, with both lay and professional prognosis of the company's future,
>
>> 'that I may be satisfied that the landlord's fears of a repetition are, if not groundless, at least so unlikely to recur, as to justify me in saying in my discretion that I am prepared to refuse the landlord's request that a new lease should not be granted. In so doing I would of course be saying effectively that I accept the reasons advanced for past failures, and, on balance, consider there is sufficient evidence to justify me in holding that a recurrence is not just unlikely, but will not in fact occur.'"

52 That approach has not been challenged or criticized on behalf of the landlord. Indeed, it is in line with the approach spelt out by Birkett, L.J. in *Betty's Cafes Ltd.* v. *Phillips Furnishing Stores Ltd.* (1), where, having read s.30(1)(b), he said ([1957] Ch. at 82):

> "This again is a subsection which makes use of the words 'ought not.' This would seem to leave some discretion in the court which hears the application to decide whether the application ought or ought not to be granted. In practice, the court would look at the history of the payments and make its decision; but if the tenant had some very good reasons to explain delays, and very good grounds for assuring the court that the like situation would never arise again, it seems difficult to say that the court could not listen to evidence to show how completely the situation had changed from the date of the notice to what it was at the date of the hearing, and that it was prevented from taking the evidence into account in considering whether the landlord had established to the satisfaction of the court that the court 'ought not' to grant the application."

53 The critical sentence is ([1988] 2 E.G.L.R. at 105): "[T]he tenant was obliged in this case to explain the reasons for the past failures and to satisfy the court that, if a new lease were granted, there would be no recurrence of the late payments of rent."

54 It seems to me that the reasons for the late payment must be referable to the factual situation which existed at the time of the late payment, but which had at the time of the hearing been cured and can be shown to be unlikely to recur. Examples, which are by no means intended to be exhaustive, would be a failure to have a bookkeeper or other person responsible for prompt payment, so that the matter has been overlooked; temporary financial difficulty with cash flow; incompetence or perhaps dishonesty of an employee who had been replaced. There is nothing of that sort here. The second and third reasons put forward, namely, that the landlord had not set up a system for rent collection and banker's orders were too expensive, were untenable. The first, namely, the complacent attitude of the landlord, merely endorses what appears to me to be the true reason, namely, that it suited the tenant financially not to pay at the due time but only when pressed by a solicitor's letter. This must have been a deliberate policy; it saved the tenant money and cost the landlord money.

55 To my mind, the flaw in the judge's reasoning is that having rejected the tenant's excuses, he failed to analyse the actual reason for late payment. Had he done so, it seems to me that there was nothing in the reasoning to indicate that the tenant would alter its ways for the future. Moreover, he seems to have thought that because the tenant was able to pay, it would be willing to do so for the future. Yet there was nothing in the tenant's conduct or evidence to suggest such a significant change of policy. I discount the fact that the rent has been punctually paid after the notice to quit. Failure to do this would have put the tenant out of court. If the judge had asked himself the true reason for the late payment, it seems to me that he would have been bound to conclude that it was a deliberate policy that involved loss to the landlord and gain to the tenant. This is entirely consistent with taking advantage of the complacent attitude of the landlord. And it is an inference which should be drawn from the rejection of the other two excuses as being untenable and the cynical attitude displayed by the letter of June 21st, 2000, in which it is said: "If you would be kind enough to suggest a convenient method of payment of rent by my client, we would be in a position to avoid the accumulations that arise from time to time."

56 This was notwithstanding the fact that the landlord's solicitors had twice asked for a standing order to be arranged and the tenant's own solicitors had advised payment by this means or regular cheques. In any event, even if the judge did not ask himself the real reason for the last payment, there was nothing in the explanation put forward by the tenant

to show that the problem would be cured. There was nothing to show that the tenant's selfish disregard of the landlord's rights was a thing of the past, even though, with a banker's order in place, it might be more difficult to indulge.

57 For these reasons, I conclude that the judge's reasoning is open to criticism and that he did not direct himself properly. In these circumstances, it is open to this court to exercise the discretion afresh. To my mind, it is repugnant to one's sense of fairness that a tenant, who at all times had been able to pay on time, that had deliberately chosen not to do so at the expense of the landlord and to its own financial advantage, and has thereby over the years deprived the landlord of considerable sums, should nevertheless be granted a new tenancy. The language of the statute, "ought not" or "ought," implies what is fair and just. Even if the tenant has the undoubted ability to pay, it does not seem to me to be right that the landlord should be forced to continue with a tenant who has treated him with such cynical disregard for his rights. Even if the relationship of landlord and tenant is not one of trust and confidence, it is far more than just an agreement by one to let property to another on payment of rent. In practice, it requires cooperation and compromise over many aspects of the relationship, such as repairs and access.

58 The landlord has been extremely tolerant even to the extent of not serving a notice to quit at the earliest opportunity. But I think it was entitled, as Mr. Neish put it, to say "enough is enough." Nor do I think that provision in the lease for payment by banker's order or guarantees by the directors, answers the point. A banker's order can be cancelled; pursuit of a guarantor involves the trouble and expense of suing the tenant and enforcing the guarantee.

59 For these reasons, I would allow the main appeal and answer the preliminary issue in favour of the landlord. As to the costs appeal, I agree with my Lords that this too should be allowed for the reasons given by Glidewell, J.A. and I agree with proposed order.

60 **NEILL, P.:** I agree that the main appeal should be dismissed for the reasons given by Glidewell, J.A. I also agree that the costs appeal should be allowed and that there should be no order for costs in the court below.

Appeal dismissed; costs appeal allowed.