Neutral Citation Number: [2018] EWHC 2461 (Ch)

Claim No. C00KT562
Appeal Ref. CH-2017-000280

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**CHANCERY DIVISION**

**ON APPEAL FROM**
**THE COUNTY COURT AT CENTRAL LONDON**

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL
Date: 24 September 2018

**Before** :

**THE HONOURABLE MR. JUSTICE MARCUS SMITH**

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**Between :**

**SARAVANANTHAN THIRUNAVUKKRASU**

Respondent
(Claimant below)

**- and -**

**(1) BALJIT SINGH BRAR**
**(2) JINDER KAUR BRAR**

Appellants
(Defendants below)

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**Mr. Timothy Cowen** (instructed by Richmond and Barnes Solicitors) for the **Appellants** (the Defendants in the court below)
**Mr. Aaron Walder** (instructed through the Bar Direct Access Scheme) for the **Respondent** (the Claimant in the court below)

Hearing date: 12 July 2018

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Mr. Justice Marcus Smith:**

## A. INTRODUCTION

1. By a lease dated 10 July 2013 (the "Lease"), the Appellants as landlords leased to the Respondent as tenant a property known as and referred to in this Judgment as 101 Stanley Road, Teddington, Middlesex TW11 8UB (the "Property").

2. On 12 February 2016, the Appellants, as the persons entitled to the reversion on the Lease, purported to forfeit the Lease by re-entering the Property. In proceedings commenced under Claim No. C00KT562 in the County Court at Kingston-upon-Thames – and subsequently transferred to the County Court at Central London – the Respondent sought:

   (1) A declaration that the Appellants' purported forfeiture of the Lease was unlawful;

   (2) Damages for trespass and/or breach of covenant; and

   (3) Damages for conversion of the Respondent's goods,

   as well as interest, costs and further or other relief.

3. On 18 May 2017, Her Honour Judge Baucher sitting in the County Court at Central London ordered the trial of a preliminary issue in the following terms:

   "There shall be a trial of a preliminary issue as to whether or not the Defendants' actions in purporting to forfeit the lease on 12 February (as set out in paragraph 14 of the Amended Particulars of Claim and agreed in paragraph 10 of the Defence) were lawful or unlawful for the reasons further particularised in paragraphs 15 and 16 of the Amended Particulars of Claim and paragraphs 11 and 12 of the Defence."

4. The pleadings say as follows:

   (1) Paragraph 14 of the Amended Particulars of Claim avers that the Appellants purported to forfeit the Lease by re-entering the Property and securing it against the Respondent. This is admitted in paragraph 10 of the Defence.

   (2) Paragraphs 15 and 16 of the Amended Particulars of Claim aver that the Appellants' re-entry onto the Property was a trespass and a breach of the Appellants' express covenant to give quiet enjoyment (paragraph 16) because:

      (a) As at 12 February 2016, there were no arrears of rent outstanding (paragraph 15(a)); and/or

      (b) By exercising the statutory mechanism for Commercial Rent Arrears Recovery ("CRAR") under Part 3 of the Tribunals, Courts and Enforcement Act 2007, the Appellants had unequivocally acknowledged the continued existence of the Lease and waived their right to forfeit it for any non-payment of rent previously fallen due. No further sums, not falling within the CRAR had fallen due to justify forfeiture (paragraph 15(b)).

**(3)** These paragraphs were disputed in the Defence. The Defence asserted:

**(a)** That there were arrears outstanding (paragraph 11(a)).

**(b)** That the use of the CRAR procedure did not constitute waiver of the right to forfeit (paragraphs 11(b) and (c)), for the reasons there set out.

**5.** The preliminary issue came before His Honour Judge Madge on 14 November 2017. At the conclusion of the hearing, which the Judge heard summarily pursuant to CPR 24 without hearing evidence, the Judge made an order declaring that the purported forfeiture of the Lease on 12 February 2016 was unlawful (the "Order"). The Judge made various orders consequential upon this, but it is this declaration that forms the substance of the Appellants' appeal. At the same time, he gave an *ex tempore* judgment, which has been transcribed (the "Judgment").

**6.** By an order dated 11 April 2018, Arnold J gave the Appellants permission to amend their grounds of appeal and granted their application for permission to appeal. There are three grounds of appeal:

**(1)** *Ground 1.* That the Judge erred in proceeding on a summary basis without hearing evidence in relation to:

**(a)** Whether a demand had been made for "insurance rent" by the Appellants, which had not been paid by the Respondent.

**(b)** Whether there had been a variation of the Lease, altering the rent payment due date.

**(c)** Whether the Appellants had accepted payment for "future rent", given that the Respondent had not discharged arrears of rent.

**(d)** Whether the CRAR procedure was defective because of the failure to give notice.[1]

**(2)** *Ground 2.* That the use of the CRAR procedure:

**(a)** Could not apply in relation to outstanding "insurance rent".

**(b)** In any event did not constitute a waiver of the right to forfeit the Lease.

**(3)** *Ground 3.* That the costs order made by the Judge – which was one of indemnity costs – should not have been made in all the circumstances.

**7.** These grounds of appeal are more comprehensible if the facts of the case are understood. The facts are set out in the next Section.

[1] This point was not in fact before the Judge, but was raised for the first time on appeal.

## B. THE FACTS

8. His Honour Judge Madge determined the preliminary issue without hearing evidence. He considered that the preliminary issue could be determined summarily according to CPR 24.[2] Accordingly, it is important that I determine this appeal – as the Judge sought to do – on the basis of facts that were not in issue between the parties. To the extent that facts were in issue, I note this: depending on their materiality, such factual controversies may have a bearing on the outcome of this appeal, given the approach adopted by the Judge.

9. Save where I identify points that were in issue, the following facts were not contentious between the parties:

**(1)** The date of the Lease was 10 July 2013, with a term expiring May 2034. According to the terms of the Lease,[3] rent was payable in four (quarterly) equal instalments. According to the Lease:

**(a)** The last quarter date before the forfeiture was 25 December 2015.

**(b)** The quarter date as regards the next due payment of rent (disregarding questions of forfeiture) was 25 March 2015.

It is appropriate to note that the Appellants pleaded that this arrangement was varied in that there was an oral agreement that the rent be paid fortnightly on or around 7 and 22 of each month.[4]

**(2)** During the course of the Lease, the Respondent was in arrears of rent.[5]

**(3)** On a date in January 2016,[6] the Appellants instructed enforcement agents to recover these arrears using the right of a landlord to effect CRAR.

**(4)** Although the rules require notice of enforcement to be provided to the tenant, it was a matter of dispute between the Appellants and the Respondent as to whether such a notice was served in this case.[7]

**(5)** On 29 January 2016, the Respondent sought to pay by cheque rent in the amount of £3,000. The Reply pleads as follows in paragraph 3(b):

> "It is admitted that on or around 29 January 2016, the [Respondent] had deposited a cheque for £3,000 into the [Appellants'] bank account. The [Respondent] did not notify the enforcement agents of this during their visit. Following his payment of the sums demanded by the enforcement agents in full, the [Respondent] cancelled the aforementioned cheque in the belief that all arears of rent had been cleared. It is admitted that this cheque was

[2] See paragraph 2 of the Judgment.
[3] Clause 6.
[4] Paragraph 2 of the Defence.
[5] The precise amounts due are not agreed, but paragraph 3(c) of the Reply makes clear that the Respondent accepted that there were arrears.
[6] The precise date on the Appellants' instructions to the Sheriff is unclear, but nothing turns on this.
[7] The Respondent avers that no notice was received: paragraph 3(a) of the Reply.

dishonoured by the bank. It is denied that multiple cheques provided by the [Respondent] were dishonoured."

It was common ground that the cheque was paid and dishonoured. The Appellants contended that the amount the enforcement agents sought to recover was reduced by £3,000 to reflect this payment, which (of course) was ultimately not received.[8]

**(6)** On 1 February 2016, the enforcement agents exercised CRAR over the Respondent's goods for stated rent arrears of £8,270. With fees, the amount distrained against (if I can use the old language) was £10,533.20. This amount was paid to the enforcement agents by the Respondent on 4 February 2016 by electronic funds transfer, and the enforcement agents passed to the Appellants the sum of £8,270.[9] The monies were received by the Appellants on 17 February 2016.[10]

**(7)** On 12 February 2016, as I have described, the Lease was purportedly forfeited by peaceable re-entry.

## C. DISTRESS, FORFEITURE AND CRAR

**10.** A right of forfeiture (or a right of re-entry) is a right to determine a lease by a landlord if:

**(1)** When exercised, it operates to bring the lease to an end earlier than it would naturally terminate; and

**(2)** It is exercisable in the event of some default by the tenant.[11]

**11.** The common law remedy of distress was replaced by the CRAR regime with effect from 6 April 2014. Distress was a remedy only available in respect of the non-payment of rent.[12] *Woodfall* describes the background as follows:[13]

"Distress was an ancient self-help remedy which entitled the landlord or an authorised bailiff to seize goods on premises let under a lease and sell them in satisfaction of arrears of rent. It was founded on the principle that the rent reserved by the demise issues out of the land, and the landlord distrains by taking possession, in the nature of a pledge, of goods and chattels found on such land. The ancient common law right was simply to enter the demised premises and seize and impound goods (at which point the distress was complete), but a right to sell the goods impounded was conferred on the landlord by the Distress for Rent Act 1689. Distress was regarded by many as an outdated and draconian approach to debt enforcement, long in need of reform, and (following a government White Paper published in March 2003) it has now been abolished with effect from April 6, 2014 by the Tribunals, Courts and Enforcement Act 2007…With effect from that date, a new statutory scheme known as Commercial Rent Arrears Recovery ("CRAR") has been introduced. The new regime applies to commercial premises only: there is no longer any right to levy distress in relation to residential premises."

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[8] Paragraph 8 of the Defence.
[9] Paragraph 13 of the Particulars of Claim, admitted by paragraph 9 of the Defence.
[10] Paragraph 20 of the Judgment.
[11] *Woodfall: Landlord and Tenant* ("*Woodfall*") at [17.057]; *Clays Lane Housing Cooperative Ltd v. Patrick* (1985) 49 P & CR 72.
[12] *Woodfall* at [7.002].
[13] *Woodfall* at [9.001].

12. The Lease contained a right of re-entry and forfeiture at clause 39:

> "39.1 The Landlord may re-enter the Property (or any part of the Property in the name of the whole) at any time after any of the following occurs:
>
> (a) any rent is unpaid 21 days after becoming payable whether it has been formally demanded or not;
>
> …
>
> 39.2 If the Landlord re-enters the Property (or any part of the Property in the name of the whole) pursuant to this clause, this lease shall immediately end, but without prejudice to any right or remedy of the Landlord in respect of any breach of covenant by the Tenant…".

## D. THE GROUNDS OF APPEAL: ORDER OF CONSIDERATION

13. The essential reason why Judge Madge decided that the forfeiture that took place on 12 February 2016 was unlawful was because he held that the Appellants had waived their right of forfeiture by exercising CRAR. This is the essence of Ground 2, which logically falls to be the first ground of appeal for consideration. Ground 2 is considered in Section E below. Thereafter, I consider Ground 1 (Section F) and Ground 3 (Section G).

## E. GROUND 2

### (1) Basis for the Judge's conclusion that the Appellants had waived their right of forfeiture by exercising CRAR

14. The Judge's reasoning was as follows:

(1) Where a right to forfeit a lease arises, the landlord has an election. He may either choose to enforce his right of forfeiture and treat the lease as being at an end; or he may choose not to enforce his right of forfeiture and treat the lease as continuing to exist.[14] Where a landlord elects to treat the lease as continuing, he is said to have "waived" his right to forfeiture.[15]

(2) Clearly, there are many ways in which a landlord may waive his right to forfeiture. One such way is by distress for rent. *Woodfall*, in a passage on which the Judge relied,[16] says this:[17]

> "Except in the special case of forfeiture for arrears of rent under the Common Law Procedure Act 1852, the right to forfeit is waived by distress. Waiver by distress depends on a different principle for that of waiver by other acts (the principle that distress can only be levied on a person who is a tenant at the time of the distress) so that a distress waives any forfeiture not only up to the day on which the rent distrained for was due but up to the day of the distress itself. A case in the year books appears to support this. It may be laid down as undoubted law."

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[14] See *Woodfall* at [17.092].
[15] See paragraph 22 of the Judgment.
[16] See paragraph 24 of the Judgment.
[17] *Woodfall* at [17.099].

**(3)** Prior to the CRAR regime introduced by the Tribunals, Courts and Enforcement Act 2007, the present case would have been one of common law distress, and the conduct of the Appellants would have amounted to a clear election. The Judge considered that, because CRAR "effectively replaced distress for rent",[18] the same held good here.

**(4)** Accordingly, the Judge found that the right to forfeit had, so far as the rent arrears prior to the CRAR were concerned (i.e. prior to 1 February 2016), been irretrievably lost by the Appellants exercising their CRAR. Accordingly, the forfeiture that took place on 12 February 2016 was unlawful, because the Appellants had no right to act in this way. The Judge rejected the various efforts of the Appellants to avoid this conclusion. In particular:

**(a)** He did not accept the contention that it is possible to elect that a lease continued for the purpose of some arrears and not others. The Appellants sought to contend that it was possible to forfeit in relation to the £3,000 arrears that were not paid because of the cancelled cheque. The Judge rejected that contention:[19]

> "One cannot elect for the lease to be both continuing in respect of certain sums due and at [an] end in relation to another sum also due. That is nonsensical."

**(b)** He also rejected the contention that the failure to pay the arrears of rent was a continuing failure, capable of generating a right to forfeit in relation to rent unrecovered pursuant to the CRAR.[20] He held that the non-payment of rent was a once-for-all breach.[21] What is more, even if the non-payment of the arrears was a continuing breach, fewer than 21 days had elapsed between the first date of continuing breach (2 February 2016) and the date of the forfeiture (12 February 2016). Accordingly, no right of forfeiture arose.[22]

## (2) The Appellants' contentions regarding the Judge's holding

**15.** The Appellants contended that the Judge's conclusion on waiver was wrong for three reasons:

**(1)** *Ground 2(i).* As a matter of law, the exercise of CRAR did not effect waiver of the right to forfeit for rent arrears at all. This contention was very short and bold: it did not follow that, simply because (under the old rules) distraining for rent did amount to an election, that rule continued under CRAR. The Appellants contended that there was no reason why – looking at the provisions of the Tribunals, Courts and Enforcement Act 2007 – CRAR should have this effect. Making a demand for the payment of past arrears does not, in the ordinary course, amount to an election to treat the lease as continuing, and that was all that the CRAR did in this case.

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[18] Paragraph 21 of the Judgment.
[19] Paragraph 29 of the Judgment.
[20] Paragraph 33 of the Judgment.
[21] Paragraph 34 of the Judgment.
[22] Paragraph 38 of the Judgment.

**(2)** *Ground 2(ii).* Alternatively, if CRAR was (in terms of the rules of waiver) identical in effect to the rules on distraint, then (because no enforcement notice had been served), there was no CRAR and therefore no possibility of waiver.

**(3)** *Ground 2(iii).* In the further alternative, even if CRAR and distress could be equated (contrary to the Appellants' contentions), the Appellants were entitled to rely on the exception provided by cases suitable for forfeiture under section 210 of the Common Law Procedure Act 1852.

**16.** I consider these various points in turn below.

## (3) Ground 2(i): CRAR cannot be equated to distress

**17.** His Honour Judge Madge found that CRAR "effectively replaced" distress for rent and that, under the CRAR regime, the law regarding waiver was unchanged from what previously pertained. Counsel for neither party was able to identify any law on this point, apart from the terms of the Tribunals, Courts and Enforcement Act 2007 itself. Both parties argued the point on the basis that the issue was one of statutory construction of the 2007 Act.

**18.** Section 71 of the 2007 Act simply states that:

> "The common law right to distrain for arrears of rent is abolished."

**19.** There is – or was – a limited statutory right to distrain arising out of sections 6-7 of the Landlord and Tenant Act 1709, but these sections have been repealed by the 2007 Act.[23]

**20.** There is no express statement that CRAR is intended to replace the right to distrain. Nor are there saving provisions, of the sort found in the Companies Act 2006, ensuring that the common law continues to have a role. The Companies Act 2006 restates, in sections 171 to 177, the duties of directors and former directors of companies that, previously, had subsisted at common law. Section 170, however, provides:

> "(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

**21.** CRAR is not a statutory codification of the law relating to distress. As has been noted in paragraph 11 above, CRAR appears to be crafted as a narrower replacement of the common law right to distrain. There are material differences between the new and the old regimes. In these circumstances, I do not consider that it can be said, without more, that CRAR is the equivalent of distress. It is not.

**22.** However, section 71 simply abolishes the common law right to distrain for arrears of rent. Nothing is said about waiver or election, which continues to be governed by the common law. The common law had reached the settled position that, so far as distress

[23] See Schedule 23 Part 4 to the 2007 Act.

was concerned, a landlord's resort to this process constituted a waiver of the right to forfeit for rent arrears. The question before me is whether that common law position has changed as a result of the abolition of distraint and the introduction of CRAR.

**23.** The essential purpose of CRAR is to replicate, albeit with important modifications (for instance: notice to the debtor; restriction to commercial rent arrears), the right to distrain. Given this, one might expect there to be nothing in the statutory scheme to displace the common law view that distraint formerly, and now CRAR, represents an unequivocal election that the lease continues.

**24.** The Respondent's contention was that the statute ought to be construed as maintaining the *status quo* except in those cases where a change was expressly made. I do not consider that this is an appropriate approach where:

**(1)** A statute does not contain a saving in relation to the pre-existing common law; and

**(2)** A rule of common law is abolished and replaced by a statutory regime containing material differences.

**25.** It seems to me that I must approach the question of the effect of CRAR by construing the 2007 Act, and not by presuming that certain aspects of the old and abolished common law regime of distress have been carried forward in the new statutory regime.

**26.** The Appellants contended that the 2007 Act, on its true construction, clearly showed that CRAR did not have the same effect in terms of the right to forfeit as distress. The provision relied upon was section 79 of the 2007 Act, which materially provides as follows:

"(1) When the lease ends, CRAR ceases to be exercisable, with these exceptions.

(2) CRAR continues to be exercisable in relation to goods taken control of under it –

(a) before the lease ended, or

(b) under subsection (3).

(3) CRAR continues to be exercisable in relation to rent due and payable before the lease ended, if the conditions in subsection (4) are met.

(4) These are the conditions:

(a) the lease did not end by forfeiture;

(b) not more than 6 months has passed since the day when it ended;

(c) the rent was due from the person who was the tenant at the end of the lease;

(d) that person remains in possession of any part of the demised premises;

(e) any new lease under which that person remains in possession is a lease of commercial premises;

(f) the person who was the landlord at the end of the lease remains entitled to the immediate reversion."

**27.** Under the old law, the essential point was that distress could only be levied whilst the tenancy was subsisting.[24] It followed that the inference from a landlord's exercise of the right of distress was a communication to the tenant that the tenancy was subsisting, hence the waiver of the right to forfeit. The Appellants put the point as follows in their written submissions:[25]

> "The crucial point…is…distress can only be levied on a person who is tenant at the time of the distress…This is important because the levy of distress on demised premises is therefore an unequivocal recognition that the lease is continuing on the day of distress itself. It is unequivocal because it cannot mean anything else – there is no other possibility…The important point is that there are no circumstances in which distress can take place after the lease has expired. That is why levying distress was an unequivocal recognition of the continued existence of the lease…That is not the case with CRAR…"

CRAR, it was contended, lacks this element of unequivocality. It is possible to exercise CRAR in circumstances where the lease is at an end. Section 79(3) makes clear that CRAR can continue to be exercised even though a lease has ended. Again, quoting from the Appellants' written submissions, "[s]ince there are possibilities that CRAR can be exercised after the end of a lease, the exercise of CRAR cannot of itself be an unequivocal recognition of the continuation of the lease."

**28.** Attractively through these submissions were made, they are misconceived:

**(1)** The question of whether the exercise of CRAR was or was not unequivocal must be considered in the context of the actual facts. Of course, I accept that whether there has been an election or not must be assessed objectively, and cannot be coloured either by the landlord's or the tenant's subjective state of mind. But, nevertheless, I must consider the Appellants' (alleged) election in context.

**(2)** The context is that, on 1 February 2016, the Lease was not at an end, as reasonable persons standing in the shoes of the Appellants and the Respondent would have appreciated. In order for CRAR to be exercised after the end of the lease, the conditions of section 79(3) have to be met. They were not.

**(3)** It follows that, given that these conditions were not met, CRAR could only be exercised whilst the lease continued.

**29.** In my judgment, the Appellants' exercise of CRAR in this case contained an unequivocal representation that the lease was continuing. Whilst, in a theoretical world, it is possible to conceive of facts that could justify the exercise of CRAR after the lease had ended, those facts did not pertain in this case. For these reasons, I consider that Ground 2(i) fails.

## (4) Ground 2(ii): There was no CRAR

**30.** Paragraph 7 of Schedule 12 to the 2007 Act provides that an "enforcement agent may not take control of goods unless the debtor has been given notice". In this case, it is a matter

[24] *Woodfall* at [9.006].
[25] Selectively quoting from paragraphs 19-22.

of controversy as to whether a notice was served.[26] I proceed on the basis that no notice was served.

31. Again, this is not a point on which any authority was cited to me. I do not consider that such a deficiency in the CRAR process can make any difference to the election of the Appellants. So far as the Appellants were concerned, they instructed the enforcement agents to effect CRAR; so far as the Respondent was concerned, the Respondent knew that CRAR had been commenced by the Appellants by the presence of the enforcement agents at the Property on 1 February 2016.

32. Indeed, the improper failure to give notice (if that was the case) rendered the CRAR, in this case, much more like the now abolished distress, which could be effected without prior notice. Nevertheless, even though notice did not have to be given, distress gave rise to a waiver of the right to forfeit.

## (5) Ground 2(iii): Reliance on section 210 of the Common Law Procedure Act 1852

33. The Appellants contended that they were entitled to rely on the exception provided by cases suitable for forfeiture under section 210 of the Common Law Procedure Act 1852.

34. The Common Law Procedure Act 1852 provides as follows:[27]

> "210 **Proceedings in ejectment by landlord for non-payment of rent**
>
> In all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the nonpayment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, which service shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for nonappearance, if it shall be made appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that either of the conditions in section 210A was met in relation to the arrears, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

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[26] See paragraph 9(4) above.
[27] Emphasis supplied.

210A **Conditions relating to commercial rent arrears recovery**

(1) The first condition is that the power under section 72(1) of the Tribunals, Courts and Enforcement Act 2007 (commercial rent arrears recovery) was not exercisable to recover the arrears.

(2) The second condition is that there were not sufficient goods on the premises to recover the arrears by that power.

**35.** It is difficult to see how this entirely theoretical ability of the Appellants to rely on section 210 takes matters any further forward. It may very well be that, had they decided to do so, the Appellants could have commenced ejectment proceedings under section 210 instead of seeking to forfeit the lease at common law by way of re-entry. I am quite prepared to presume that section 210 ejectment proceedings could have been commenced by the Appellants, and would have succeeded.

**36.** If they had done so, then the Appellants' prior resort to CRAR would not have affected their claim under section 210. In *Brewer (on the demise of Lord Onslow) v. Eaton*, (1783) 3 Douglas 230, 99 ER 627, a landlord distrained for the sum of £200 (being two years' rent), but took goods only to the amount of £20. The landlord then commenced ejectment proceedings under the predecessor of section 210. It was contended that the distress waived the right under the Act. This contention was given short shrift. Lord Mansfield said:

"The statute speaks of a landlord "who hath by law a right to re-enter", which means a right to re-enter reserved to him in the lease. At common law, the distress operated as a waiver of the forfeiture which incurred on the non-payment; but here the distress affords no presumption that the landlord has waived the forfeiture, because, as the statute requires him to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrears due, he has distrained in order to complete the title given to him by the statute".

Similarly, Willes J:

"The lessor of the plaintiff had two remedies; one by distress, the other by re-entry. At common law, the distress waived the re-entry; but the statute restores that remedy where by common law it was taken away."

**37.** Had the Appellants invoked section 210, then their prior use of CRAR would not have precluded this. But this fact says nothing about forfeiture at common law, and nothing about waiver. It is simply that the very act that at common law constitutes waiver, under the section 210 demonstrates that one of the prerequisites of the section are met. The section 210 procedure is invoked by the service of a writ in ejectment. Thereafter, at trial, the landlord must prove *(i)* that half a year's rent was due, and *(ii)* that one of the two conditions in section 210A was met. The second of these section 210A conditions is that the invocation of CRAR did not enable recovery of the arrears.

**38.** As Russell LJ noted in *London and Country (A & D) Ltd v. Wilfred Sportsman Ltd*, [1971] Ch 764 at 786:

"There was no right of re-entry at all unless and until it was shown that distress was an insufficient remedy, and it could not be said that the very prerequisite of the right destroyed the right."

### (6) Insurance rent

39. The issue in relation to insurance rent arises both under Ground 2 and Ground 1. I consider it in relation to Ground 1.

### (7) Conclusions

40. For these reasons, and subject to the separate consideration of the point arising in relation to insurance rent, Ground 2 of the appeal is dismissed.

## F. GROUND 1

41. The substantial issue in relation to Ground 1is whether the Judge erred in dealing with the preliminary issue summarily under CPR 24 because, in his judgment, there were no issues of fact to be determined.

42. The Appellants contend that the Judge erred in proceeding on a summary basis without hearing evidence in relation to:

(1) Whether a demand had been made for "insurance rent" by the Appellants, which had not been paid by the Respondent.

(2) Whether there had been a variation of the Lease, altering the rent payment due date.

(3) Whether the Appellants had accepted payment for "future rent", given that the Respondent had not discharged arrears of rent.

(4) Whether the CRAR procedure was defective because of the failure to give notice.[28]

43. In paragraph 2 of his Judgment, the Judge noted that "[c]ounsel for both parties this morning agreed at the commencement of this hearing that acting in accordance with my powers in CPR 3.3, I should determine this issue summarily in accordance with the principles set out in Part 24, and that there was accordingly no need for me to hear any oral evidence".

44. Neither party before me (Mr. Cowen, however, did not appear below) contended that this did not accurately reflect what was said before the Judge, and in these circumstances, it is very difficult to see how this ground can succeed.

45. Indeed, so far as three of the four points raised by the Appellants are concerned (i.e., all except the "insurance rent" point), it is plain that the Judge was right in concluding that matters could be determined summarily:

(1) The Judge held that even if the Lease had been varied to alter the rent payment due date, this would not have affected the outcome of the preliminary issue: there would still have been arrears of rent prior to 1 February 2016, over which the exercise of CRAR would (for the reasons I have given) have constituted a waiver of the right to forfeit.

[28] This point was not in fact before the Judge, but was raised for the first time on appeal.

**(2)** I do not consider that the determination of the preliminary issue turns on the question of payment of "future rent", but the point is clearly a bad one: it was common ground that there were arrears. It may be, that (on the basis of a varied Lease) payments of rent became due after 1 February 2016. But, given the 21 days that needed to pass before the Appellants could exercise their right to forfeit, the point goes nowhere: the Appellants purported to forfeit the Lease a mere 12 days later.

**(3)** Reading the Judgment, it does not appear that the defective CRAR point was before the Judge. In any event, for the reasons given in paragraphs 30-32 above, the preliminary issue can be determined in favour of the Respondent even if it is assumed that the CRAR was defective.

**46.** I turn to the question of "insurance rent". "Insurance Rent" is a defined term in the Lease, essentially obliging the tenant to pay half of the insurance premium for the Property. Clause 2.3 of the Lease makes clear that the rent payable by the tenant includes (amongst other things) Insurance Rent.

**47.** The Judge decided the point against the Appellants. Specifically:

**(1)** There were evidential directions contained in the order of Judge Baucher regarding the evidence to be adduced in relation to the preliminary issue.[29]

**(2)** Prior to the hearing before Judge Madge, no factual evidence had been led to demonstrate that a demand for Insurance Rent had in fact been made.[30]

**(3)** Before the substantive hearing of the preliminary issue, an application was made to adduce new evidence. Although the Judge did look at this evidence, and considered that it did not show that any demand for Insurance Rent had been made, he determined the matter summarily, without admitting any further documentary evidence and without hearing evidence.[31]

**48.** Additionally, although this point was not specifically taken by the Judge, the arrears of Insurance Rent are not properly pleaded. Paragraph 6(a) of the Defence pleads that the Respondent "had been put on notice of the accrued insurance rent prior to the period ending 24 December 2014", but the paragraph defining the scope of the preliminary issue (paragraph 11 of the Defence) makes no reference to Insurance Rent arrears.

**49.** It may be that the Insurance Rent point would, in any event, have failed, even if substantively taken into account. That was certainly Judge Madge's view,[32] and it is not one that I would dissent from. However, I determine the appeal on the basis that the Judge was entitled to determine the issue pursuant to CPR 24 in the manner that he did. It seems

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[29] Paragraph 7 of the order of Judge Boucher dated 18 May 2017.
[30] Paragraphs 36-37 of the Judgment.
[31] Paragraphs 36-37 of the Judgment.
[32] See paragraphs *34ff* of the Judgment. The Judge took the view that Insurance Rent fell outside CRAR. In this he was probably right, given the definition of rent in section 76 of the Tribunals, Courts and Enforcement Act 2007. But he also concluded that, even if the right to Insurance Rent was not susceptible to the CRAR process, the CRAR process nevertheless amounted to a waiver of the right to forfeit in respect of arrears of Insurance Rent also.

to me that the Judge had a choice between proceeding with the preliminary issue, without going into the Insurance Rent point, or to adjourn the hearing, thus enabling proper evidence to be adduced and – critically – to allow the Respondent to deal with the point. The Judge chose the former course. In my judgment, the Judge was well within his rights to decline to expand the ambit of the evidence before the Court, particularly when that evidence was fragmentary and incomplete. The Judge noted that the point was not even raised in the Appellants' written submissions.[33] As a matter of case management, he was right to ensure that the Respondent was protected from surprise late points raised by the Appellants, and he was entitled to decide the preliminary issue on the evidence actually adduced.

**50.** For the reasons I have given, Ground 1 is dismissed.

## G. GROUND 3

**51.** The question of costs is typically one for the original decision-maker, and an appellate court ought to be slow to overturn a matter that, in the first instance, falls within the discretion of the trial judge.

**52.** In this case, given that the question of costs was considered not in the Judgment (which was in the appeal bundle) but in separate argument (not set out in the appeal bundle), I should be particularly careful not to improperly override the discretion of the judge at first instance.

**53.** I can see nothing to suggest that the Judge erred in the question of costs and, given that I have affirmed the Judge's essential reasoning, it seems to me that his costs order for the hearing of the preliminary issue ought to stand. I therefore dismiss Ground 3.

## H. DISPOSITION

**54.** For the reasons I have given, the appeal is dismissed. I will hear from the parties as to the appropriate form of order in light of this judgment.

[33] Paragraph 35 of the Judgment.