Neutral Citation Number: [2019] EWCA Civ 2032

Case No: A3/2018/2476

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Marcus Smith J
[2018] EWHC 2461 (Ch)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HHJ Madge
COOKT562

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

Between :

Baljit Singh BRAR (1) **Jinder Kaur BRAR (2)**	**Appellants/ Defendants**
- and -	
Sarvanathan THIRUNAVUKKRASU	**Respondent/ Claimant**

- -
- -

Timothy Cowen (instructed by **Richmond and Barnes Solicitors**) for the **Appellants**
Aaron Walder (instructed by **York Solicitors**) for the **Respondent**

Hearing date : 6 November 2019

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Approved Judgment

Sir Terence Etherton MR, Lord Justice David Richards and Lord Justice Newey :

1. The central issue on this appeal is whether a lessor's exercise of commercial rent arrears recovery ("CRAR") pursuant to the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") waives the lessor's right to forfeit the lease for arrears of rent then outstanding.

2. The appeal is from the order of Marcus Smith J dated 24 September 2018 dismissing the appeal by Baljit Singh Brar and Jinder Brar, the appellant lessors of commercial retail premises at 101 Stanley Road, Teddington, Middlesex ("the Property"), from the order dated 14 November 2017 of His Honour Judge Madge, sitting in the County Court at Central London, declaring that purported forfeiture of the lease of the Property by the appellants on 12 February 2016 by peaceable re-entry was unlawful and ordering them to pay damages to the respondent tenant, Sarvananthan Thirunavukkrasu, for trespass and breach of covenant.

CRAR

3. Relevant provisions of the 2007 Act relating to CRAR are set out in the Appendix to this judgment.

The factual background

4. The following brief statement of the background facts is sufficient for the purposes of this appeal. There are various factual disputes between the parties on their respective statements of case which do not affect the outcome of this appeal.

5. By a lease dated 10 July 2013 the appellants let the Property to the respondent for a term ending on 16 May 2034 at an annual rent of £15,000, subject to review, payable by four equal instalments in advance on 25 March, 24 June, 29 September and 25 December. The permitted use of the Property was as a retail shop. The lease contained a proviso for re-entry if any rent was unpaid 21 days after becoming payable.

6. The rent due on 25 December 2015 was not paid. On 18 January 2016 the appellants instructed enforcement agents to exercise CRAR to recover the rent arrears. On 1 February 2015 the enforcement agents went to the Property and took control of the respondent's goods in order to recover what were stated to be £8,270 arrears of rent and fees, totalling in aggregate £10,533.20. That amount was paid to the enforcement agents by the respondent on 4 February 2016 by electronic funds transfer.

7. On 12 February 2016 the lease was purportedly forfeited by the appellants by peaceable re-entry.

8. On 17 February 2016 the appellants received £8,270 from the enforcement agents.

The proceedings

9. The present proceedings were commenced by a claim form issued by the respondent on 10 May 2016 claiming, among other things, a declaration that the appellants' purported forfeiture of the lease was unlawful, damages for trespass and breach of covenant and damages for conversion of the respondent's goods.

10. In amended particulars of claim dated 4 July 2016 the respondent alleged, among other things, that he had carried on the business of a newsagent and convenience store at the Property; as at 12 February there were no arrears of rent outstanding in respect of which the appellants had a right to forfeit the lease; by exercising CRAR the appellants had unequivocally acknowledged the continuance of the existence of the lease and waived their right to forfeit the lease for non-payment of any sums which had fallen due under the lease up to and including the quarter's rent falling due on 25 December 2015; the appellant's re-entry was a trespass and a breach of the lessor's covenant in the lease for quiet enjoyment; the appellants wrongfully took possession of a large quantity of goods and shop stock belonging to the respondent and converted them to their use; the respondent no longer sought to return to the property and accepted the appellant's repudiation of the lease; by reason of those matters, the respondent had suffered loss and damage.

11. The appellants served a defence and counterclaim dated 15 July 2016, in which all the substantive allegations against the appellants of their wrongful conduct were denied. In particular, the appellants alleged that as at 12 February 2016 there were rent arrears of £3000 for the period up to 24 December 2015; the exercise of CRAR had not waived the appellants' right to forfeit the lease; there was no trespass or breach of the covenant of quiet enjoyment; the respondent had suffered no loss or damage attributable to any wrongdoing by the appellants. The appellants counterclaimed loss and damage on various grounds but they are not relevant to this appeal.

12. The respondent served a reply and defence to counterclaim but nothing on this appeal turns on that document.

13. By an order dated 15 May 2017 Her Honour Judge Baucher, sitting in the County Court at Central London, ordered, among other things, that there be a trial of a preliminary issue "as to whether or not the [appellants'] actions in purporting to forfeit the lease on 12 February … were lawful or unlawful …"

Judgment of Judge Madge

14. The preliminary issue came before Judge Madge on 14 November 2017. On his own initiative, but with the consent of counsel for both sides, he treated the hearing as if it was an application for summary judgment against the appellants under CPR Part 24 as an issue of law on undisputed facts.

15. At the end of that day Judge Madge delivered an impressive, immediate and detailed oral judgment, in which he held that there was no real prospect of the appellants successfully defending the preliminary issue as to whether or not the forfeiture was legal or illegal. With no disrespect to the judge, it is unnecessary for us to set out here his detailed reasons. It is sufficient to say that he considered that, where a right to forfeit arises, the lessor has to make an election; that CRAR had replaced common law distress and that, just as distress for rent was an election to treat the lease as still continuing and so waived the right to forfeit, so in the present case the exercise of CRAR operated as a waiver of the right to forfeit.

16. The appellants raised a further issue before Judge Madge in relation to insurance rent, arguing that the respondent owed insurance rent and that, as CRAR could not be exercised to recover any sums in respect of insurance rent under section 76(2) of the

2007 Act, the appellants were entitled to forfeit for outstanding insurance rent. That argument was rejected on the grounds that there was insufficient evidence that the insurance rent was in arrears and, even if it was, it was not possible to elect that a lease continue for one purpose but not another. That point on insurance rent is not pursued in the present appeal.

17. As stated above, Judge Madge's formal order dated 14 November 2017 declared that the purported forfeiture of 12 February 2016 was unlawful and the lease came to an end on 4 July 2016, and it ordered that damages for trespass and breach of covenant be entered against the appellants to be assessed.

The appeal to, and judgment of, Marcus Smith J

18. The appellants appealed to the High Court. There were various grounds of appeal but the critical one, for present purposes, was that, irrespective of the significance of outstanding insurance rent at the date of the appellants' purported re-entry, the exercise of CRAR did not constitute a waiver of the right to forfeit. The appeal was heard by Marcus Smith J on 12 July 2018. He handed down his written judgment on 24 September 2018 dismissing the appeal.

19. On the issue of waiver and CRAR, the critical elements of the appellants' argument before Marcus Smith J, so far as relevant to the present appeal, were that (1) as a matter of law, the exercise of CRAR did not effect waiver of the right to forfeit for rent arrears merely because under the old rules distraining for rent did amount to an election; alternatively (2) there was no CRAR because the appellants had not served notice of enforcement on the respondent as required by paragraph 7(1) of Schedule 12 to the 2007 Act; alternatively, (3) the appellants were entitled to rely on section 210 of the Common Law Procedure Act 1852 ("the 1852 Act"). Sections 210 and 210A of the 1852 Act are set out in the Appendix to this judgment.

20. Again, with no disrespect, it is not necessary for us to set out the detailed reasoning in the judgment of Marcus Smith J. It is sufficient to summarise his conclusions as follows. He held (at [29]) that the exercise of CRAR on the particular facts of the present case contained an unequivocal representation that the lease was continuing. He held (at [31]) that, assuming that no prior notice of enforcement was served on the respondent as required by the 2007 Act, that made no difference to the election of the appellants as they instructed the enforcement agents to effect CRAR and, so far as the respondent was concerned, he knew that CRAR had been commenced by the appellants by the presence of the enforcement agents at the Property on 1 February 2016. Marcus Smith J also held (at [37]) that section 210 of the 1852 Act could not assist the appellants as the section 210 procedure was invoked by the service of a writ in ejectment but no ejectment proceedings were ever commenced by the appellants against the respondent.

The present appeal

21. The appellants' grounds of appeal to this court mirror those before Marcus Smith J on the issue of waiver, namely: (1) he was wrong to hold that the exercise of CRAR contained an unequivocal representation that the lease was continuing and so waived the right to forfeit, and, insofar as he took into account whether reasonable persons standing in the shoes of the appellants and the respondent would have appreciated that

the lease was not an end, he was wrong to do so as that was irrelevant; (2) in reaching his conclusion that the absence of the requisite prior notice of enforcement to the respondent would make no difference to the election by the appellants, Marcus Smith J ought not to have found as a fact that 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: he should have allowed the appeal and remitted that question of fact to the county court for a decision at trial; and (3) Marcus Smith J was wrong to decide that the theoretical nature of the ability of the appellants to rely on section 210 of the 1852 Act prevented them from relying on it to show that CRAR was not the communication of an election to treat the lease as continuing: he should have decided that there was no act of waiver because the question was what the lessor could theoretically have done at the time of the alleged act of waiver.

Discussion

22. We address the grounds of appeal in the order in which they were addressed by Mr Timothy Cowen, counsel for the appellants, in his oral submissions.

Ground 1: CRAR as an act of waiver

23. It is not in dispute that at common law the right of a lessor to forfeit was waived by distress. Mr Cowen said that he agreed with the following description of distress at [11] of Marcus Smith J's judgment (omitting the Judge's footnote references):

> "Distress was a remedy only available in respect of the non-payment of rent. *Woodfall* describes the background as follows:
>
> > "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.""

24. Mr Cowen submitted that, based on that description, distress was "a function of the existence of the lease" and a common law remedy "which issued out of the fact of the lease"; it was "part of the lease itself" and was "inherent in and exclusive to the relationship of landlord and tenant" and so did not survive the end of the lease. That appears to us be a rather complicated way of saying that, subject to statutory provisions which we discuss below, distress was a common law remedy available to a lessor against a tenant during the currency of the tenancy. In the absence of that remedy, entry on the land demised to the tenant during the currency of the lease would have been a trespass by the lessor unless authorised by the terms of the lease itself or by statute. Those are uncontroversial propositions.

25. Mr Cowen also advanced the uncontroversial propositions that the common law remedy of distress has been abolished and has been replaced by the statutory remedy of CRAR, and the conditions for CRAR are not identical to the former common law right of distress. Most obviously, unlike distress at common law, CRAR is only available to a landlord of commercial premises. There are other differences, but it is not necessary to set them out here.

26. Mr Cowen's next proposition, namely that previous authorities on distress are not binding on this appeal, is less straightforward. While CRAR is a statutory remedy and common law distress no longer exists, waiver of forfeiture is a common law principle, the conditions of which have not been altered with the statutory introduction of CRAR. Those conditions were well expressed in the following words of Parker J in *Matthews v Smallwood* [1910] 1 Ch 777, at 786-787:

> "if a defendant in an action of ejectment based upon that right of re-entry alleges a release or abandonment or waiver, logically speaking the onus ought to lie on him to shew the release or the abandonment or the waiver. Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes, or appears to recognize, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose. Therefore we get the principle that, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place. It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say "I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve." That is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything. Logically, therefore, a person who relies upon waiver ought to shew, first, an act unequivocally recognizing the subsistence of the lease, and, secondly, knowledge of the circumstances from which the right of re-entry arises at the time when that act is performed."

27. Mr Cowen accepted that passage as an accurate statement of the law and also the following passage in the judgment of Buckley LJ in *Central Estates v Woolgar (No.2)* [1972] 1 WLR 1048 which characterised waiver of forfeiture as an irrevocable election:

> "The landlord's right is a right to elect whether to treat the lease as forfeit or as remaining in force. Any election one way or the other, once made, is irretractable: *Scarf v. Jardine (1882) 7 App.Cas.*345 *per* Lord Blackburn at p. 360. If the landlord by word or deed manifests to the tenant by an unequivocal act a concluded decision to elect in a particular manner, he will be bound by such an election. If he chooses to do something such as demanding or receiving rent which can only be done consistently with the existence of a certain state of affairs, viz., the continuance of the lease or tenancy in operation, he cannot thereafter be heard to say that that state of affairs did not then exist. If at the time of the act he had a right to elect whether to forfeit the lease or tenancy or to affirm it, his act will unequivocally demonstrate that he has decided to affirm it. He cannot contradict this by saying that his act was without prejudice to his right of election continuing or anything to that effect. In this respect his act speaks louder than his words, because the act is unequivocal: it can only be explained on the basis that he has exercised his right to elect. The motive or intention of the landlord, on the one hand, and the understanding of the tenant, on the other, are equally irrelevant to the quality of the act."

28. Mr Cowen's fundamental point on ground 1 of the appeal is that, whatever may have been the consequence at common law of levying distress on the lessor's right to forfeit, the exercise of CRAR in the present case, and indeed in any case, is not of itself an unequivocal act, manifesting a concluded decision to affirm the existence of the lease. He submitted that it was not an unequivocal act, but rather a neutral act, because CRAR will continue to be exercisable up to six months after the end of a lease if the conditions in section 79(4) of the 2007 Act apply. That submission was made in the context of his overarching approach that an assessment of whether forfeiture has been waived requires an "element of imagination" and postulating a "parallel world", in which a lease has ended and asking whether the act or acts asserted by the tenant to have been a waiver were things that could only have been done during the continuance of the lease or, on the contrary, could have been done even if the lease had ended: if they were the latter, then the act or acts cannot have been an unequivocal affirmation of the continued existence of the lease.

29. We reject that analysis, which is flawed on several grounds. In the first place, appraisal of whether or not the lessor has done an unequivocal act manifesting a concluded decision to affirm the lease is entirely straightforward and does not require the kind of hypothetical "parallel world" suggested by Mr Cowen. There is no authority for any such approach. Secondly, the effect of section 79(4)(a) of the 2007 Act is that CRAR can never be exercised when a lease has been brought to an end by forfeiture. Accordingly, because the general scenario being considered is one where a lessor wishes to forfeit the lease, even if it was appropriate to imagine a parallel world in which the lease has ended, the imaginary world would have to be one in which the lease has come to an end by forfeiture and so there could be no post termination CRAR. As it happens, on the actual facts of the present case, at the date when CRAR was purportedly exercised by the appellants, forfeiture was the only way of bringing

the lease to an end as it had many years to run and was not excluded from the protection of the Landlord and Tenant Act 1954. Thirdly, the existence of a statutory power to exercise CRAR after a lease has ended otherwise than by forfeiture cannot logically throw any light on whether the exercise of CRAR before the lessor has purported to forfeit the lease waives the right to forfeit. Fourthly, since CRAR can only be exercised by a lessor and, by virtue of section 79(4)(a) of the 2007 Act, cannot be exercised after termination of the lease by forfeiture, CRAR in principle amounts to an unequivocal act confirming the lessor's decision to affirm the continuation of the lease, just as was the levying of distress at common law.

30. Moreover, such authority as exists which bears upon this point is against the appellants. That authority relates to section VI of the Landlord and Tenant Act 1709, which enabled a lessor, where the tenant held over after determination of the lease, to levy distress in respect of arrears of rent which accrued before the termination of the lease. Section VI was in the following terms:

> "AND whereas Tenants per auter vie and Lessees for Years or at Will frequently hold over the Tenements to them demised after the Determination of such Leases And whereas after the Determination of such or any other Leases no Distress can by Law be made for any Arrears of Rent that grew due on such respective Leases before the Determination thereof it shall and may be lawful for any Person or Persons having any Rent in arrear or due upon any Lease for Life or Lives or for Years or at Will ended or determined to distrain for such Arrears after the Determination of the said respective Leases in the same Manner as they might have done if such Lease or Leases had not been ended or determined"

31. Section VI did not apply to a lease brought to an end by forfeiture: *Doe on the Demise of David v Williams* (1835) 7 Car & P 322, 173 ER 143; *Grimwood v Moss* at (1871-72) LR 7 CP 360, 365.

32. Although section 79 of the 2007 Act is much more comprehensive and prescriptive than section VI of the 1709 Act, they have, for the purposes of the present appeal, the same relevant feature of conferring a statutory right on the lessor to go on to land in the possession of a tenant, who has held over after termination of the lease otherwise than by forfeiture, and to seize control of the tenant's goods on the land in order to recover arrears of rent which accrued before the termination of the lease.

33. The same point as was submitted by Mr Cowen about the significance, in respect of waiver of forfeiture, of the lessor's right to exercise CRAR after the end of the lease pursuant to section 79 of the 2007 Act was raised in *Doe on the Demise of David v Williams* with reference to section VI of the 1709 Act. In that case the issue was whether the lessor's common law right to forfeit a periodic tenancy by reason of the tenant's denial (or, as it was called there, disclaimer) of the lessor's title had been waived by the lessor distraining for arrears of rent during the currency of the periodic tenancy (a notice to quit served by the landlord having been found to be invalid). Counsel for the lessor is recorded as having advanced the following argument:

> "E. V. Williams, for the lessor of the plaintiff.—Distraining is not *per se* any acknowledgment of a tenancy or waiver of a disclaimer; for the distress might have been under the statute 8 Anne, c. 14, ss. 6 & 7, after the expiration of the tenancy; and I submit that, in order that the distress should have operated as a recognition of a subsequent tenancy, it should be shewn that the distress was made for rent which became due subsequently to the disclaimer."

34. The lessor's case was given short shrift by Patteson J in the following brief judgment:

> " Patteson, J.—The statute of Anne, which allows a distress to be made after the tenancy has expired, applies only to cases in which the tenancy has been determined by lapse of time, or perhaps by notice to quit, and not to cases where it has been put an end to by the tenant's own wrongful disclaimer. The mere act of distraining for rent *prima facie* recognises the distrainee as being tenant of the distrainor at the time of the distress made. As it appears that the notice to quit is informal, and that the disclaimer has been waived, the plaintiff must be nonsuited."

35. The point was also raised, although not as part of the central reasoning of the court, in *Ward v Day* (1863) 4 B&S 337, 122 ER 486. That case concerned a licence to get copperas stone for 21 years subject to a proviso that, if any part of the rent should be in arrear for 21 days, it should be lawful for the licensor, his heirs and assigns by notice in writing to the licensees, his executors, administrators or assigns to determine "the grant". One of the issues was whether the right to determine the licence for arrears of "rent" had been waived by the plaintiff, the current owner of the land, when he had purported to distrain goods on the land for arrears of "rent". The purported distraint was unlawful because the grant was of a licence and not a lease. After the purported distraint the licensor and the licensee continued to negotiate the grant of a new licence from the date when the licence would expire in the ordinary course. Blackburn J said the following (at 358-359):

> "If this had been a lease, another question would have arisen, whether or not, inasmuch as under stat. 8 Ann. c. 14, ss. 6, 7, a landlord may distrain within six months after the lease is determined, the fact of making a distress within six months after the forfeiture accrued would be sufficient evidence that the landlord was treating the estate as continuing, when it might be that he was distraining under the idea that the estate was at an end, but that by force of the statute he might distrain within six months of the determination of the tenancy. I incline to think that it would."

36. That view of Blackburn J, which is directly against Mr Cowen's argument, is also consistent with the principle that waiver is determined by objective assessment of whether the lessor has done an unequivocal act which recognises the existence of the lease with knowledge of the ground of forfeiture without reference to the lessor's subjective intentions.

37. Mr Cowen referred us to, and submitted he gained some support from, the following statement by Bramwell B in *Croft v Lumley* (1858) 6 HL Cas 672 at 705 in an opinion for members of the House of Lords:

> "When a lessee commits a breach of covenant, on which the lessor has a right of re-entry; he may elect to avoid or not to avoid the lease, and he may do so by deed or by word; if, with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne) or demanding subsequent rent, he elects not to avoid the lease; …"

38. We cannot see that that expression of opinion provides any support for the appellants. It does no more than state that distress during the subsistence of a lease waives forfeiture up to the date of the distress but that distress under the 1709 Act after the termination of the tenancy does not.

39. Mr Cowen referred us to *Church Commissioners for England v Nodjoumi* (1986) 51 P&CR 155. In that case Hirst J rejected the submission of the tenant by assignment that the landlord had waived the right to forfeit the lease for non-payment of rent which had accrued prior to the service of an invalid notice under section 146 of the Law of Property Act 1925 which the landlord had served in the mistaken belief that the assignment was in breach of covenant. The reasoning of Hirst J was that, as the purpose and effect of a section 146 notice was to operate as a preliminary to actual forfeiture, it was not capable of being an unequivocal affirmation of the existence of the lease. We are unable to see any relevance of that case to ground 1 of the appeal.

40. For those reasons we reject ground 1 of the appeal.

Ground 3 - Effect of the Common Law Procedure Act 1852

41. Section 210 authorises the lessor, where there is six months or more rent in arrear, to forfeit the lease, without formal demand or actual re-entry, by the service of proceedings for possession. Mr Cowen advanced the following argument in reliance on section 210 of the 1852 Act. Firstly, he relies on *Brewer on the demise of Lord Onslow v Eaton* (1783) 3 Doug 230, 99 ER 627, which concerned the statutory predecessor to section 210, as supporting the proposition that, prior to the introduction of CRAR, where the rent was six months or more in arrears, the levying of distress by the lessor would not waive the lessor's right to forfeit the lease in the way permitted by section 210 since the section itself presupposed that distress had been levied but was insufficient. As Lord Mansfield said in that case:

> "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 him by the statute."

42. The same point was made by Willes J, as follows:

> "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."

43. *Brewer d. Onslow v Eaton* was followed and applied in *Thomas v Lulham* [1895] 2 QB 400. In that case Lord Esher MR, agreeing with the other members of the Court, Kay and A.L. Smith LJJ, said as follows at 405:

> "I agree with the judgments which have been read by my learned brethren. My view is that the old common law has not been altered, and that the receipt of rent by a landlord still operates as a waiver of a forfeiture previously accrued. But, in my opinion, the statute has given to the landlord a new, original, and independent right, and I think that under the statute the plaintiff was entitled to levy the distress, without thereby waiving his right of re-entry."

44. Secondly, Mr Cowen submitted that, following the 2007 Act, with its removal of the reference to insufficient distress and the substitution of the reference to the conditions in the new section 210A, which include insufficient recovery by CRAR, the same principle as to non-waiver of forfeiture applies.

45. Thirdly, Mr Cowen submitted that, provided there was six months or more rent in arrear at the time of purported peaceable re-entry by the lessor, as in the present case, the principle under section 210 of non-waiver of forfeiture by earlier insufficient recovery by CRAR applies even though the lessor chose not to commence proceedings for possession pursuant to section 210.

46. In short, his argument was that, where six months or more rent was in arrear at the time that the lessor exercised CRAR, such exercise of CRAR was not an unequivocal affirmation of the continuation of the lease as the lessor could subsequently have served proceedings for possession pursuant to section 210 and, were the lessor to do so, the statute would entitle the lessor to an order for possession notwithstanding the earlier exercise of CRAR. Whether or not the lessor actually intended, at the time of exercise of CRAR, to bring proceedings for forfeiture pursuant to section 210 was, Mr Cowen submitted, irrelevant as that was a matter going only to the lessor's subjective intention.

47. There can be no dispute as to the first and second limbs of Mr Cowen's argument. His third limb is, however, plainly wrong. It is inconsistent with both *Brewer d. Onslow v Eaton* and *Thomas v Lulham*. Those cases make it clear that distress, and, by parity of reasoning, now the exercise of CRAR, operate at common law to waive forfeiture in all cases but section 210 provides the lessor with a statutory defence to a claim of waiver should the lessor subsequently bring proceedings for possession pursuant to that section. The effect of Mr Cowen's argument would be to read section 210 as abolishing waiver of forfeiture by distress and now the exercise of CRAR in all cases where six months or more rent was in arrear at the date of the distress or the exercise of CRAR. That would not only amount to substantially re-writing section

210 but it would mean that that this fundamental point on waiver has been overlooked by all lessors and courts since 1852 and by all academic and other commentators on the law relating to tenancies since that time.

48. For those reasons we do not consider that ground 3 is seriously arguable and we reject it.

Ground 2: No requisite notice

49. As we understand this point, it is that (1) the appellants contend that their own purported exercise of CRAR was invalid and, in effect, a nullity because no notice was given to the respondent pursuant to paragraph 7(1) of Schedule 12 to the 2007 Act prior to the enforcement agents attending the Property to take control of goods in exercise of CRAR; (2) Marcus Smith J should not have found (as he did in [31] of his judgment) that "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"; and so (3) Marcus Smith J should not have found that there was waiver.

50. There is no merit in this ground of appeal.

51. As Mr Aaron Walder, for the respondent, pointed out, paragraph 11 of the amended Particulars of Claim alleged that on 18 January 2016 the appellants instructed enforcement agents to exercise CRAR at the Property to recover rent arrears allegedly due under the lease. Paragraph 12 alleged, among other things, that on 1 February 2016 enforcement agents attended the Property and took control of goods belonging to the respondent by removing them from the Property. Paragraph 7 of the Defence admitted paragraph 11 of the particulars of claim in so far as it relates to rent due until 24 December 2015. Paragraph 8 of the defence admitted paragraph 12 of the particulars of claim in so far as the agents attended the Property and seized goods to the value of £10,533.20. Paragraph 8 of the defence further stated, among other things, that the respondent had been placed on notice of rent arrears totalling £11,270 plus enforcement costs of £90.00 by the enforcement agents prior to their attendance; and that, the enforcement agents were notified upon their attendance at the Property on 1 February 2016 that the respondent had made a cheque payment of £3,000 in part settlement of the arrear "and therefore only proceeded with CRAR in respect of the balance outstanding at that time." The defence was verified by a statement of truth signed by the appellants. The preliminary issue was ordered on the basis of those statements of case and summary judgment was given by Judge Madge, as noted by Marcus Smith J at [43], on the footing, agreed by counsel, that there was no need to hear any oral evidence.

52. Marcus Smith J was, therefore, perfectly entitled to proceed, as he did in paragraph [31] of his judgment, on the footing that the appellants instructed the enforcements agents to effect CRAR and the respondent knew that CRAR had been commenced by the appellants by the presence of the enforcement agents on the Property on 1 February 2016.

53. Even if, which seems highly doubtful in any event in view of paragraphs 7 and 8 of the defence, it was open to the appellants to contend before Marcus Smith J that CRAR was never exercised because of the failure to serve notice pursuant to paragraph 7(1) of Schedule 12 to the 2007 Act, the entry of the enforcement agents on

the Property and the seizure of the respondent's goods in purported exercise of CRAR was a waiver of forfeiture. Objectively, the admitted facts were consistent only with an intention on the part of the appellants to treat the lease as continuing because they plainly intended to exercise CRAR. Indeed, in the appellants' skeleton argument for this appeal, it is stated that "between the date when the right to forfeit accrued and the date of re-entry, agents instructed by [the appellants] purported to exercise CRAR over [the respondent's] goods at the [Property]".

54. Even if the CRAR exercised by the appellants was technically invalid for lack of prior notice to the respondent, and the presence of the enforcement agents on the Property was strictly speaking a trespass, that is irrelevant on the facts. As Blackburn J said in *Ward v Day* at 359 on the facts of that case:

> "He [the licensor] was wrong in thinking he could distrain, for the deed was not a lease. But although the distress was illegal, it was not the less an indication of his state of mind, viz that, thinking it [the licence] was a lease, he considered it still as continuing."

55. We, therefore, reject ground 2 of the appeal.

Conclusion

56. For the reasons set out above, we dismiss this appeal.

APPENDIX

Tribunals Courts and Enforcement Act 2007

71 Abolition of common law right

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

72 Commercial rent arrears recovery (CRAR)

(1) A landlord under a lease of commercial premises may use the procedure in Schedule 12 (taking control of goods) to recover from the tenant rent payable under the lease.

(2) A landlord's power under subsection (1) is referred to as CRAR (commercial rent arrears recovery).

77 The rent recoverable

(1) CRAR is not exercisable except to recover rent that meets each of these conditions—

(a) it has become due and payable before notice of enforcement is given;

(b) it is certain, or capable of being calculated with certainty.

(2) The amount of any rent recoverable by CRAR is reduced by any permitted deduction.

(3) CRAR is exercisable only if the net unpaid rent is at least the minimum amount immediately before each of these—

(a) the time when notice of enforcement is given;

(b) the first time that goods are taken control of after that notice.

(4) The minimum amount is to be calculated in accordance with regulations.

(5) The net unpaid rent is the amount of rent that meets the conditions in subsection (1), less—

(a) any interest or value added tax included in that amount under section 76(1)(a) or (b), and

(b) any permitted deductions.

(6) Regulations may provide for subsection (5)(a) not to apply in specified cases.

(7) Permitted deductions, against any rent, are any deduction, recoupment or set-off that the tenant would be entitled to claim (in law or equity) in an action by the landlord for that rent.

79 Use of CRAR after end of lease

(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.

(5) In deciding whether a person remains in possession under a new lease, section 74(2) (lease to be evidenced in writing) does not apply.

(6) In the case of a tenancy by estoppel, the person who was the landlord remains "entitled to the immediate reversion" if the estoppel with regard to the tenancy continues.

(7) A lease ends when the tenant ceases to be entitled to possession of the demised premises under the lease together with any continuation of it by operation of an enactment or of a rule of law.

SCHEDULE 12

TAKING CONTROL OF GOODS

…

PART 2
THE PROCEDURE

…

Notice of enforcement

7

(1) An enforcement agent may not take control of goods unless the debtor has been given notice.

(2) Regulations must state—

(a) the minimum period of notice;

(b) the form of the notice;

(c) what it must contain;

(d) how it must be given;

(e) who must give it.

(3) The enforcement agent must keep a record of the time when the notice is given.

(4) If regulations authorise it, the court may order in prescribed circumstances that the notice given may be less than the minimum period.

(5) The order may be subject to conditions.

…….

Common Law Procedure Act 1852

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; …

[The underlined words were substituted by the 2007 Act Sch 14 para. 15 in place of the words: "and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due"]

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.