



Neutral Citation Number: [2018] EWCA Civ 2874

Case No: B5/2017/0223

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HH Judge Walden-Smith
A10CL143

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2018

Before:

LORD JUSTICE LEWISON
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

Between:

CAROLYN GIBBS
- and -
LAKESIDE DEVELOPMENTS LIMITED

Appellant

Respondent

Rupert Higgins (instructed by direct access) for the **Appellant**
Gary Blaker QC (instructed by **LSGA Solicitors**) for the **Respondent**

Hearing dates: 26 July 2018

Judgment Approved

Lord Justice David Richards:

1. This second appeal raises one point of principle. If a possession order was liable to be set aside for non-service of the proceedings, can the tenant recover the proceeds of sale of the property on the basis of unjust enrichment without the possession order first being set aside? Both courts below – District Judge Parfitt (as he then was) and, on a first appeal, Judge Walden-Smith, both sitting in the County Court at Central London – held that the order must first be set aside and dismissed the appellant’s claim. Permission for a second appeal was given by Patten LJ who said that it raised a point of principle in a developing area of the law that was suitable for determination by this court on a second appeal.
2. The salient facts are as follows.
3. By a lease dated 14 November 1986, a studio flat at Coopers Close, Whitechapel, London E1 (the property) was let to the appellant for a term of 999 years at a commencing yearly rent of £50. Under the terms of the lease, the tenant was also liable for insurance premiums. In 1990, the appellant went to live and work in Hong Kong and for the great majority of the time from 1990 the flat was unoccupied. She gave the managing agents the address of her parents’ house (Dellwood) for correspondence. From 1990 to 2006, they corresponded with her there and she duly paid the amounts due by way of rent and insurance premiums. She returned to the UK in 1999 and lived, first, at Dellwood and from late 2008 in Dorset. She last visited the property in 2003.
4. In 1990 the respondent acquired the freehold reversion. The managing agents continued, as the trial judge found, to send demands and other communications to Dellwood and also to the property, but from 2006 no payment of rent or insurance premiums was made, except for one payment of £630.14 in August 2007. The trial judge found that by reason of other commitments the appellant overlooked the communications sent to Dellwood, and never saw those sent to the property which remained unoccupied.
5. In September 2009, the respondent issued a claim for arrears of rent and insurance premiums amounting to £1410.62. The respondent purported to serve the claim form by sending it to the property, but this was not good service because it was not her usual or last known residence. Judgment in default of appearance was entered for the sum claimed on 24 September 2009. No application has at any time been made to set aside this judgment.
6. On 20 November 2009, the respondent issued possession proceedings, which again were incorrectly served by being sent to the property. A copy was sent to Dellwood but it did not come to the attention of the appellant. A possession order was made on 24 February 2010 and the respondent took possession of the property on 28 April 2010. The respondent’s agents started marketing the property in June 2011.
7. The appellant first became aware of the possession proceedings and order in July 2011 when she learnt that the property was being offered for sale. She immediately wrote to the solicitors who had acted for the respondent in the possession proceedings and to the estate agents marketing the property. On the respondent’s instructions, the estate agents did not reply and the solicitors replied only to say that they were no

longer instructed. The property remained on the market. The appellant instructed solicitors in October 2011. They applied to register a caution against the title of the property but, while the fee cheque was cashed, no notice was entered. On 21 October 2011, the solicitors issued an application for relief against forfeiture and to set aside the possession order. They requested an undertaking from the respondent not to sell an interest in the property but none was offered. No application was made for an interim injunction pending the hearing of the appellant's application. If an injunction had been applied for and granted, the appellant would of course have been required to give an undertaking in damages to make good any losses suffered by the respondent if the application for relief against forfeiture failed.

8. On 15 December 2011, the respondent granted a new long lease of the property at a premium to a third party who had no knowledge or notice of the appellant's claim.
9. The appellant's application was adjourned at the first hearing on 6 January 2012 in the light of the sale of the property. In March 2012, the appellant amended her application notice "to make the claim one of unjust enrichment and to add a claim for damages for conversion of [the appellant's] possessions in the Property", as it is put in the appellant's skeleton argument on this appeal. A significant part of the trial judge's judgment is taken up with a consideration of whether the appellant had, by the time of the trial, abandoned the claim for relief against forfeiture and to set aside the possession order. Having carefully considered the tortuous procedural history of the application, the trial judge held that it had been abandoned, and this decision was upheld by Judge Walden-Smith on appeal.
10. For the purposes of the point of principle justifying a second appeal, the appellant's case is that it was not necessary to set aside the possession order.
11. This issue was addressed by the trial judge and by Judge Walden-Smith, who held on the basis of authorities to which I will refer that there can be no claim in unjust enrichment for money paid or property transferred or extinguished pursuant to an order of the court without first setting aside the order. On this appeal, Mr Higgins on behalf of the appellant does not challenge this as a general proposition but he submits that it is subject to an exception in a case where an order cannot be set aside by reason of intervening third party interests. In such a case, he submits, it should be sufficient to establish that the order would otherwise have been set aside.
12. The authorities establish that an order of the court has the force of law, and that a step taken in compliance with it is necessarily lawful. Such a step cannot therefore result in "unjust" enrichment unless the order is set aside.
13. The authorities in point are few and, for the most part, old. The textbook writers are unanimous in setting out the effect of a court order that has not been set aside, although there is some disagreement in the underlying explanation of why a claim for unjust enrichment can be maintained once an order is set aside. The general principle is well stated by Professor Virgo in *The Principles of the Law of Restitution* (3rd ed. 2015) at p.147:

"When money has been paid by the claimant to the defendant as the result of a court judgment it cannot be recovered unless the judgment is set aside, for the judgment constitutes a basis for the payment. The judgment

operates as a legally effective basis for the defendant's receipt, even if the judgment has been obtained by fraud. It is only where the judgment is subsequently set aside that restitution will be awarded. Similarly, where a judgment has been declared for too much money, the claimant is unable to recover the excess money paid to the defendant until the judgment has been rectified."

14. In *Moses v Macferlan* (1760) 2 Burrow 1005, 97 ER 676, Lord Mansfield, giving the unanimous opinion of the court, said that:

"It is most clear, "that the merits of a judgment can never be over-haled by an original suit, either at law or in equity". Till the judgment is set aside, or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes."

15. The claim in *Moses v Macferlan* was to recover as money had and received a sum paid by the plaintiff to the defendant pursuant to the order of an inferior court. The claim succeeded on the basis of a special factor that the inferior court did not have jurisdiction to entertain a defence in contract that would have been available to the defendant in a superior court. The claim for money had and received was not therefore inconsistent with the judgment of the inferior court.

16. In *De Medina v Grove* (1846) 10 QB 152, 116 ER 59, an action for money had and received was brought to recover sums paid in excess of a judgment debt in order to obtain the release of the judgment debtor from prison. The position then was that a judgment creditor was entitled at law to enforce the full amount of a judgment debt, even if part had already been paid, and the judgment debtor's remedy lay in an application to the equitable jurisdiction of the Court of Queen's Bench or to a Court of Equity. On this ground the action for money had and received was dismissed, a decision upheld by the Court of Exchequer Chamber. In giving the judgment of the Court of Queen's Bench, Lord Denman CJ said:

"If such an action as the present would lie, great inconsistency might follow. The Court might refuse, upon application, to interfere with the judgment or execution, and yet, if such an action could be brought, the defendant in the original action might recover the money levied, and so defeat both judgment and execution.

If there was any fraud in the case, that might be a ground for the interference of the Court to set aside the judgment or the execution: but, whilst both remain unreversed, it would be contrary to principle to reverse them in effect by an action to recover back the amount levied. No case was cited, nor are we aware of any that could be cited, to warrant such a proceeding."

17. This remains the law. In *Blakey v Solicitors Regulation Authority* [2014] EWHC 2168 (Admin), Foskett J said at [19] "the general principle is that a court order...is valid and enforceable until it is set aside". A striking example of this was *M v Home Office* [1992] QB 270, where the Home Secretary was held to be personally in contempt of court for not complying with a mandatory injunction which, because it was an interim

injunction against the Crown, should not have been granted. Although the Home Office was entitled as of right to have the order set aside, it was binding and effective until it was set aside.

18. It can be seen that an order of the court is binding and effective until set aside not only because it necessarily provides lawful authority for the steps taken pursuant to it, but also because of the practical consequences in terms of inconsistent judgments, additional costs and the public interest in finality to litigation. This is so even if the order was obtained by fraud. In such a case the correct procedure is to seek to set aside the order.
19. As I said earlier, Mr Higgins did not challenge that this was in general the correct principle but he submitted that it should give way in a case where, because of the intervention of third party rights, the order cannot be set aside but it can be shown to be an order that would otherwise be set aside on grounds, for example, that the proceedings were not served on the defendant.
20. I do not accept the premise of this submission that the order in this case could not be set aside without interfering with the rights of the new lessee of the property. This was briefly discussed by DJ Parfitt in his judgment, albeit noting that it had not been discussed by counsel in their submissions. He expressed the view, and I agree, that the order could be set aside on terms that did not call into question the new lessee's title, but confined the consequences of setting aside the order to a financial remedy against the respondent, by reference to the premium received by the respondent on the grant of the new lease, less sums properly due to the respondent.
21. I therefore conclude that both judges below were right to hold that the appellant could not succeed in her claim for unjust enrichment without first setting aside the possession order.
22. There was little reference in the judgments below to the question whether simply setting aside the possession order would have assisted the appellant. Her non-payment of the rent and insurance premiums entitled the respondent, under the terms of the lease, to forfeit it and on 28 April 2010 the respondent physically re-entered the property, as it was entitled to do without the need for an order for possession. Setting aside the possession order would not reverse the forfeiture and it would remain necessary for the appellant to obtain relief against forfeiture, but whether that could still be obtained was not considered by the courts below. Issues relating to relief against forfeiture were raised by the respondent as part of its case that it was too late for the appellant to revive its claim to set aside the possession order, but it did not base its response to the unjust enrichment claim or to this appeal on grounds specific to the forfeiture of the lease. In his judgment, Lewison LJ considers this issue, concluding that setting aside the possession order would not have assisted the appellant. I agree with his judgment.
23. At the hearing before DJ Parfitt, the appellant submitted that, if as a matter of law, it was necessary to set aside the possession order, the judge should do so. As I have earlier mentioned, the District Judge, and Judge Walden-Smith on appeal, held that the appellant had abandoned any claim to set aside the order and it was too late for her to revive at the trial. For that purpose, both judges examined in detail the procedural history of the case.

24. Whether the appellant should have been permitted to seek to have the possession order set aside turned entirely on the facts of this particular case and was not an appropriate issue for a second appeal. For this reason, the order of Patten LJ was restricted to giving permission to appeal on the point of principle addressed above. Having given permission to appeal on that issue in paragraph 1 of his order, Patten LJ said in paragraph 2: “I refuse permission on the separate ground (if that is what it is) that Judge Walden-Smith simply endorsed or rubber-stamped the decision of the District Judge. This does not raise any point of principle.”
25. I am clear that Patten LJ refused permission to appeal against Judge Walden-Smith’s dismissal of the appeal against the District Judge’s refusal to hear a claim to set aside the possession order. Despite this, we heard argument on this point. Having done so, there are in my judgment no grounds on which this court could interfere with the concurrent decisions of the courts below. Even if it were open to us to do so, I do not consider that anything would be gained by, in this judgment, going through for a third time the detailed procedural steps taken in this case and repeating, as I would, the same conclusions reached by the courts below.
26. For these reasons, I would dismiss the appeal.

Lord Justice Coulson;

27. I agree with both judgments.

Lord Justice Lewison:

28. I agree with the judgment of David Richards LJ; but I wish to add a few observations on the process for forfeiting a long lease of residential property.
29. First, the lease must contain a forfeiture clause. Ms Gibbs’ lease contained such a clause. Although we have not seen the lease itself, the pleadings show that it contained a clause entitling the landlord to forfeit if the rent or other monies reserved as rent were in arrear for more than 21 days. Although at common law rent becomes payable whether or not the landlord demands it, that is not so in the case of a tenant under a long lease of a dwelling. Section 166 of the Commonhold and Leasehold Reform Act 2002 provides that such a tenant “is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice.” Thus, second, the landlord must give the lessee such a notice; and it must be in the prescribed form. In addition section 167 of that Act provides that a landlord of such a tenant:

“may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, service charges or administration charges (or a combination of them) (“the unpaid amount”) unless the unpaid amount—

- (a) exceeds the prescribed sum, or
- (b) consists of or includes an amount which has been payable for more than a prescribed period.”

30. The prescribed sum is £350; and the prescribed period is 3 years: Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004.
31. In her witness statement of 21 October 2011 Ms Gibbs raised the question whether these provisions had been complied with; and said that her solicitors were investigating. However, it was never suggested that the landlord had failed to comply and no more was heard of the investigation. We may assume, therefore, that the landlord complied with these requirements.
32. The third hurdle to forfeiture in the case of service charges is in section 81 of the Housing Act 1996. That provides:

“A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless—

 - (a) it is finally determined by (or on appeal from) the appropriate tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or
 - (b) the tenant has admitted that it is so payable.”
33. Ms Gibbs made no payment of rent or insurance contributions after August 2007.
34. On 1 September 2009 the landlords claimed outstanding rent and insurance charges via the Money Claims Online process. They recovered judgment in default for £1410.62 on 24 September 2009. That sum exceeded the sum prescribed under section 167 of the 2002 Act; and was a determination by a court. The way was now open for the landlords to forfeit the lease. It is important to note that Ms Gibbs has never applied to set aside the money judgment.
35. At common law there are two distinct methods by which a landlord may forfeit a lease. He may either forfeit by peaceful physical re-entry; or by legal proceedings. In the case of residential property, the first of these methods is subject to statutory restrictions. Section 2 of the Protection from Eviction Act 1977 provides:

“Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them.”
36. However, it was Ms Gibbs’ case that the flat had been empty since 2003. So no one was lawfully residing there. It follows that section 2 of the 1977 Act did not apply.
37. The landlords began proceedings for possession on 20 November 2009, relying on the money judgment. Where a landlord chooses to forfeit a lease by legal proceedings the settled case law says that the moment of forfeiture is the time at which the

proceedings are served on the tenant: *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433. However, in the present case both the District Judge and the Circuit Judge have held (for different reasons) that the proceedings were not served on Ms Gibbs. So those proceedings cannot have effected the forfeiture.

38. The landlords obtained an order for possession on 24 February 2010. The order also required Ms Gibbs to pay £1480.62 “for rent arrears”. Following that judgment, the landlords entered into possession of the flat on 28 April 2010. That, as it seems to me, must have been the time of the operative forfeiture. Since there was no bar in this case to physical re-entry, that exercise of the right to forfeit was lawful.
39. In the county court, relief against forfeiture for non-payment of rent is governed by section 138 of the County Courts Act 1984. Under section 138 (3) the court can only make an order if satisfied that the landlord is entitled to forfeit. The order that it is then required to make is an order for possession within not more than 28 days unless within that period the lessee pays all the rent in arrear and the costs of the action. The period may be extended at any time before possession is obtained pursuant to the order. Section 138 (7) provides that if the tenant does not pay then “so long as the order remains unreversed the lessee shall, subject to subsections (8) and (9A), be barred from all relief.” In *Di Palma v Victoria Square Properties Ltd* [1986] Ch 150 this court held that “barred from all relief” meant relief both in the county court and in the High Court.
40. Section 138 was amended by the Administration of Justice Act 1985. It inserted a new subsection (9A) which provides:

“Where the lessor recovers possession of the land at any time after the making of the order under subsection (3) (whether as a result of the enforcement of the order or otherwise) the lessee may, at any time within six months from the date on which the lessor recovers possession, apply to the court for relief; and on any such application the court may, if it thinks fit, grant to the lessee such relief, subject to such terms and conditions, as it thinks fit.”
41. In *Lovelock v Margo* [1963] QB 786 this court held that the equivalent provision in section 191 (3) of the County Courts Act 1959 gave the county court power to grant relief against forfeiture following peaceable re-entry. The landlord argued that the county court had no power at all to grant relief against forfeiture after a peaceable re-entry. This court, not surprisingly in view of section 191 (3), rejected that argument. The report does not reveal how long a period elapsed after the re-entry before the tenant applied for relief. The only date given is the date of the re-entry: 28 August 1961. The report of the case in the All England Law Reports ([1963] 2 All ER 13) reveals one further date: the order under appeal was made by the county court on 17 July 1962. The application for relief must have been made some time before that. But time limits were not in issue in that case.
42. Since the county court is a court created by statute, it can in principle do only what the statute permits it to do. Moreover, where Parliament has imposed a particular time limit on an application for relief against forfeiture, that implicitly ousts any broader jurisdiction that the court may have: *Official Custodian for Charities v Parway*

Estates Development Ltd [1985] Ch 151; *Harrison v Tew* [1989] QB 307, (affirmed [1990] 2 AC 523). Ms Gibbs did not apply for relief against forfeiture until 21 October 2011, nearly one and a half years after the landlords had recovered possession. By that time I consider that it would have been too late for the county court to have granted her relief against forfeiture. For as long as the proceedings stayed in the county court, whether or not the possession order was set aside could have made no difference to the consequences of the landlords' lawful exercise of their right of forfeiture.

43. Would the position have been any different in the High Court? The High Court inherited the ancient jurisdiction of the Court of Chancery which claimed power to relieve against forfeiture without limit of time. In *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 511 the point that arose for decision was whether the court had any power to grant relief against forfeiture under section 146 of the Law of Property Act 1925 once the landlord had re-entered by taking physical possession. The landlord had in fact only been in possession for a few hours; and the breach relied on was not a failure to pay rent. So the court's equitable jurisdiction to grant relief for non-payment of rent was not in issue. In the Court of Appeal, *Browne-Wilkinson V-C* recounted the history of statutory intervention in that equitable jurisdiction:

“The Landlord and Tenant Act 1730 (4 Geo. 2, c. 28) recited that landlords had been adversely affected by the courts of equity granting relief from forfeiture for non-payment of rent long after the lease had been forfeited at law. Section 2 of the Act provided that any bill for relief from forfeiture had to be filed within six months after judgment for execution was recovered in the common law courts, failing which the equitable jurisdiction to relieve was barred. If the bill in equity was filed, the tenant was bound to pay into court the full amount of arrears of rent and costs. Moreover, under section 4, if the tenant tendered such arrears of rent and costs, such tender stayed the proceedings at common law. Finally, section 4 provided that if relief was given in equity, the original lease revived, without the necessity for the grant of a new lease.

The Act of 1730 was repealed and in effect re-enacted by sections 210 to 212 of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76). Unless all arrears of rent and costs are paid within six months of the order for possession at law, all rights to relief at law and in equity are barred. Section 211 recognises the continuation of the right to apply for relief in equity, but re-enacts the requirement that the tenant's right to relief in equity is to be barred unless he pays into court the arrears and costs claimed. Section 212 re-enacts the provisions whereby proceedings at law are stayed if payment or tender of arrears and costs is made. The Act of 1852 is still the basic statute regulating relief from forfeiture for non-payment of rent.

By the Common Law Procedure Act 1860 (23 & 24 Vict. c. 126) the jurisdiction of courts of equity to relieve against

forfeiture for non-payment of rent was conferred on the common law courts....

It has been decided by authority that both the High Court (under its inherent equitable jurisdiction) and the county court (under section 139 of the Act of 1984 and its predecessors) can relieve against forfeiture effected by peaceable re-entry after such re-entry has occurred and *without limit of time*: *Howard v Fanshawe* [1895] 2 Ch 581; *Thatcher v C H Pearce & Sons (Contractors) Ltd* [1968] 1 WLR 748 and *Lovelock v Margo* [1963] 2 QB 786.

In summary, the basic jurisdiction to relieve from forfeiture for non-payment of rent is the old equitable jurisdiction; that equitable jurisdiction (and the statutory application thereof in the county courts) is subject to a separate code of statutory provisions modifying and limiting the equitable jurisdiction in certain respects, particularly in relation to time; however the old equitable jurisdiction to relieve, *without limit of time*, continues to apply where there has been a forfeiture by peaceable re-entry.” (Emphasis added)

44. Whether the equitable jurisdiction is quite as wide as that (“without limit of time”) is, I think, highly debateable. In *Howard v Fanshawe* the forfeiture by peaceable re-entry took place on 21 February 1894 and the application for relief was made on 6 July 1894: within six months. Stirling J said:

“The statute [i.e. the Common Law Procedure Act 1852] fixes a period of six months only from recovery in ejectment within which an application for relief may be made, and it is said that the whole evil which the Act was passed to remove would be re-introduced if it were to be held that the jurisdiction to give relief were to be applied in a case where peaceable possession had been taken. Upon that two observations may be made: first, that if the landlord desires to limit the time within which the tenant can apply for relief, he can avail himself of legal process to recover possession and so get the benefit of the statute; and, secondly, that it does not follow that a Court of Equity would now grant relief at any distance of time from the happening of the event which gave rise to it. It appears to me that, inasmuch as the inconvenience of so doing has been recognised by the legislature, and a time has been fixed after which, in a case of ejectment, no proceedings for relief can be taken, a similar period might well be fixed, by analogy, within which an application for general relief in Equity must be made. A Court of Equity might possibly say that the action for relief must be brought within six months from the resumption of possession by the lessor.”

45. Thus *Howard v Fanshawe* is not authority for the wide proposition. In *Thatcher v CH Pearce & Sons Ltd* the forfeiture by peaceable re-entry took place on 4 July 1964 and the application for relief was made on 8 January 1965: 6 months and 4 days later. Sir Jocelyn Simon P rightly described the final sentence I have quoted from *Howard v Fanshawe* as “guarded wording” and went on to say:

“As I understand the old equitable doctrine, the court would not give relief in respect of stale claims. Furthermore, if there were a statute of limitation applying at common law, equity followed the law and applied the statute to strictly analogous proceedings in Chancery. But there is no question in the instant case of a Limitation Act applying to the present situation; and it seems to me to be contrary to the whole spirit of equity to boggle at a matter of days, which is all that we are concerned with here, when justice indicates relief.”

46. *Thatcher v Pearce* was thus concerned with a delay of a few days only. As I have said, time limits were not in issue in *Lovelock v Margo* and it is not possible to derive a chronology from the reports of the case. Accordingly, I do not, with respect, consider that the authorities upon which Browne-Wilkinson V-C relied support the breadth of the proposition. Nor, I think, did his colleagues in *Billson*. Nor, in my judgment, is the proposition consistent with the decision of the House of Lords in *Shiloh Spinners Ltd v Harding* [1973] AC 691. In that case Lord Wilberforce discussed the breadth of the equitable jurisdiction to relieve against forfeiture. At 724 he said:

“As regards covenants to pay rent, in spite of Lord Eldon L.C.'s reservations, the matter has, subject to qualifications which need not be discussed, been taken over by statute, first by 4 Geo. 2 c. 28 [i.e. the Landlord and Tenant Act 1730] then by later Acts leading up to the Law of Property Act 1925.”

47. As Parker LJ pointed out in *Billson* at 521:

“In my view this is a clear statement that, in the case of covenants between lessor and lessee, relief against forfeiture is now regulated wholly and exclusively by statute. I can attribute no other meaning to the words “taken over.”

48. Lord Wilberforce went on to say in *Shiloh* at 724:

“Secondly, a point of more difficulty arises from the intervention of Parliament in providing specific machinery for the granting of relief against forfeiture of leases: see Law of Property (Amendment) Act 1859 (22 & 23 Vict. c. 35), Common Law Procedure Act 1852, Law of Property Act 1925, Leasehold Property (Repairs) Act 1938 and other statutes. This, it is said, negatives an intention that any corresponding jurisdiction should exist outside the case of leases. I do not accept this argument. In my opinion where the courts have established a general principle of law or equity, and the

legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law. To suppose otherwise involves the conclusion that an existing jurisdiction has been cut down by implication, by an enactment moreover which is positive in character (for it amplifies the jurisdiction in cases of leases) rather than negative.”

49. Commenting on that passage Parker LJ said:

“This proceeds on the basis that, although in the case of leases (the area in which the legislature had stepped in) equitable relief could not be granted it does not follow from section 146 that in other areas equitable relief was also excluded.”

50. Moreover, Nicholls LJ (who dissented in the result) said at 526:

“In rent cases, the tenant can apply for relief for up to six months after possession has been retaken, either under a court order or otherwise. That is the period stated in section 210 of the Common Law Procedure Act 1852 or *applied by equity by analogy.*” (Emphasis added)

51. At 529 he added:

“This is not to say that courts of equity should now grant relief without any regard to the statutory provisions. Equity follows the law, but not slavishly nor always: see Cardozo C.J. in *Graf v. Hope Building Corporation* (1930) 254 N.Y. 1, 9. On this we have the benefit of guidance elsewhere in the field of relief from forfeiture. Section 210 of the Common Law Procedure Act 1852, which is still in force, limited to six months after judgment the period within which a tenant could apply for relief in the non-payment of rent cases to which that statute applied, viz., where the rent was six months in arrears. Courts of equity have due regard to this statutory limitation in non-payment of rent cases where the statute does not apply: in cases of forfeiture by peaceable re-entry, and in cases where possession has been taken under a court order where less than six months' rent was in arrears.”

52. He concluded at 530:

“The concurrent equitable jurisdiction can only be invoked by those who apply with reasonable promptitude. What is reasonable will depend on all the circumstances, having due regard to the statutory time limits. In the exercise of its jurisdiction courts of equity should apply, by analogy, the statutory time limits..., but not with a strictness which in all the

circumstances would lead to a result Parliament could never have intended.”

53. I observe also that Browne-Wilkinson V-C also said at 516:

“I have found this a very difficult case to decide, not least because common sense and justice both require that the tenant's right to relief ought not to depend upon whether the forfeiture is enforced by action or by peaceable re-entry: the tenant ought to have broadly the same rights whichever procedure the landlord adopts.”

54. Yet he had expressly accepted in the passage I have already quoted that the equitable jurisdiction to relieve against forfeiture for non-payment of rent was “subject to a separate code of statutory provisions modifying and limiting the equitable jurisdiction in certain respects, particularly in relation to time.”

55. I should add that the decision of this court in *Billson* was reversed by the House of Lords, but on a completely different point and their Lordships did not discuss time limits for applying for relief against forfeiture. Where a decision of this court is reversed by the House of Lords on a different point, the decision of this court is no longer binding, although it remains persuasive authority: *Balabel v Air-India* [1988] Ch. 317, 325; *R (Al-Mehdawi) v Secretary of State for the Home Department* [1989] 2 WLR 603, 608. However, since, on my reading, both Parker and Nicholls LJ took a narrower view of the width of the equitable jurisdiction than Sir Nicolas Browne-Wilkinson, I consider that their approach represents the correct one.

56. I should note that in *Pineport Ltd v Grange Glen Ltd* [2016] EWHC 1318 (Ch), [2016] L & TR 28 Chief Master Marsh granted relief against forfeiture of a lease of an industrial unit following a forfeiture by peaceable re-entry on an application made 14 months later. The claim was originally made in the county court, but then transferred to the High Court because the county court lacked jurisdiction after a delay of that length. At [19] the Chief Master said:

“Plainly, in this case where the application was made 14 months after re-entry, the claimant has a significant obstacle to overcome whether the court has “due regard” to the six month period under the 1852 Act or the period is taken as a guide. It is not that the court is unable, as a matter of jurisdiction, to grant relief where an application is made some considerable time outside the six month period but rather whether the court should exercise its jurisdiction to do so. The issue of “reasonable promptitude” necessarily involves consideration of the reasons for the delay by the claimant; it also may involve considering those reasons in the overall context as what is reasonable may vary depending on that context.”

57. In the result the Chief Master granted relief, referring to a variety of “human factors” including the depression of the main human actor, the lack of specialist advice, the existence of a restraint order and the consequent lack of money with which to pay the arrears. He concluded at [64]:

“Although 14 months is more than double the guide period of 6 months (and near to the breaking point for the concept's elasticity), I am satisfied that it would be wrong to bar the claimant from obtaining relief in the circumstances of this case.”

58. I have considerable doubts whether the Chief Master was right to decide that case in the way that he did. Be that as it may, by the time that Ms Gibbs made her application to set aside the judgment, the elasticity of “reasonable promptitude” had snapped. In those circumstances, in my judgment even if the judgment for possession had been set aside, it would have done Ms Gibbs little good in circumstances in which her application to set aside the judgment was made one and a half years after the landlords recovered possession. The money judgment for the arrears of service charge would always have presented an insuperable barrier to the success of any claim for relief against forfeiture.